

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-019613

02/13/2008

HONORABLE A. CRAIG BLAKEY II

CLERK OF THE COURT
L. Gilbert
Deputy

MIRAGE CROSSING RESORT CASITAS
HOMEOWNERS ASSOCIATION INC

JOHN E CHAIX

v.

MIRAGE HOMES CONSTRUCTION INC, et al.

JILL ANN HERMAN

JACK G BARONE
DANIEL A BEATTY
JASON J BLISS
ADAM B CAMPBELL
DOUGLAS H FITCH
MICHAEL J FRAZELLE
MICHAEL L GREEN
SUSANNE E INGOLD
MELISSA LIN
ANDREW R PESHEK
JAN-GEORG ROESCH
KACI YOUNG BOWMAN
JOHN A ELARDO
WILLIAM R METTLER JR.
F LISA ALLEN
LLOYD J ANDREWS
MARK ANDREW NICKEL

MINUTE ENTRY

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This matter has been under advisement on various Third-Party Motions for Summary Judgment on the issue of indemnification, as well as on Third-Party Defendant Markham's Motion to Dismiss Defendants' breach of implied warranty claim. Defendants/Third-Party Plaintiffs ("Defendants") and several of the Third-Party Defendants move for summary judgment on the issues of contractual indemnity and/or defense obligations. Defendants contend that the subcontractor agreements signed by Third-Party Defendants include an indemnity provision and the duty to defend. The Third-Party Defendants still subject to these Motions are: Castle Drywall ("Castle"); GAC; Century Roofing ("Century"); David Howard Electric ("DHE"); Alvin Concrete, Arizona Door and Trim, Eagle Valley Construction, Gypsum Floor Masters and Maycon Iron Design (collectively, "Alvin Concrete"); Jedco Construction, ACC; Sunrise Stucco, Inc.; and Jordan Windows & Doors ("Jordan").

Castle argues that the issue of indemnity is a factual one, saying there must first be a determination as to who or what caused the defect. As to the duty to defend, Castle maintains that such a duty is not specifically stated in the subcontractor agreement and, unlike an insurance contract, the contractual relationship between Castle and the Defendants does not impose an express duty to defend.

Depending on the type of indemnification, the right to indemnification begins when the indemnitee incurs a legal obligation to pay or a sum has been paid. INA Ins. Co. of North America v. Valley Forge Ins. Co., 150 Ariz. 248, 252-253, 722 P.2d 975 (App. 1986). This is different than an indemnitor's duty to defend, which generally exists regardless of liability. Hawkins v. McGillacuddy, 175 Ariz. 42, 50, 852 P.2d 1226 (App. 1992) citing INA. This latter duty begins when a claim is made against the indemnitee and covers all reasonable expenses incurred in defending the claim, since a party is not held harmless if it must suffer the costs of its own defense. INA, 150 Ariz. at 255, citing Northwestern Pacific Indemnity co. v. Junction City Water Control District, 296 Or. 365, 677 P.2d 671 (1984).

The Court finds that the right to indemnification turns on questions of fact, which requires a determination of both the Defendants' and Third-Party Defendants' liability. However, with respect to the duty to defend, the Court finds that the subcontractor agreement imposes said duty in the phrase "hold Contractor harmless from any and all claims, demands, liabilities, losses, expenses, suites, and actions, including attorneys' fees and costs" Id. Accordingly,

IT IS ORDERED denying Defendants' Motion for Summary Judgment on the issue of indemnity, and granting their Motion as to the duty to defend.

Like Castle's argument, Third-Party Defendant GAC also asserts that the duty to indemnify requires a factual determination, so it is inappropriate for summary judgment. GAC also maintains that the duty to defend fails because the contract does not impose a present duty to

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defend and that the Defendants' tender of said duty was insufficient since Defendants did not relinquish control of the case.

For the reasons set forth above, and because the issue is premature,

IT IS ORDERED denying Defendants' Motion for Summary Judgment on the issue of indemnity.

With respect to the present duty to defend argument, the Court finds that GAC does not truly distinguish the holding in INA. Furthermore, the Court finds that Defendants explicitly tendered their defense to GAC through two separate letters, both of which permit GAC to assume control of the defense. For these reasons,

IT IS ORDERED granting Defendants' Motion for Summary Judgment as it pertains to GAC's duty to defend.

Century attacks the indemnity provision on the basis that it does not unequivocally address the Defendants' active negligence and that the provision is overbroad, which goes against public policy. Century also points to the two subcontractor agreements it has with the Defendants. The first contract has an indemnity agreement, while the second contract's indemnity provision is crossed out. These agreements are the basis for Century's own Motion for Summary Judgment re: Express Indemnity. With respect to the duty to defend, Century argues that the indemnity agreement under the first contract does not include any language that would manifest a present obligation to defend. Instead, the agreement references the duty to indemnify and hold harmless, the latter not being the same as a present duty to defend. However, Century concedes that it may have a duty under the first contract to reimburse Defendants' defense costs depending upon the scope of the indemnity agreement. Century also argues that the Defendants' tender was improper because they never surrendered control of the defense.

The Defendants counter that their September 12, 2005 letter is clear on its face regarding the tender of defense. The Court finds that the first subcontractor agreement unequivocally addresses liability by stating that Defendants are only responsible for their sole negligence. Thus, because of this limitation, Century's public policy argument fails. However, the indemnity provision is crossed out in the second agreement. Because it is unclear as to which job order applies to which contract, the intent of the parties must be determined. Furthermore, Century alleges that Mirage was the designer of and the framer on certain aspects of the project, thereby impacting the roofing issues. Accordingly, because there are issues of whether the second contract is retroactive and what work is covered by both agreements,

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IT IS ORDERED denying both the Defendants' and Century's Motions for Summary Judgment regarding the issue of indemnity.

In regard to Century's duty to defend, the Court finds that Defendants timely tendered to the subcontractor, but only the first contract creates a duty to defend. Therefore, up to the date the second contract was signed,

IT IS ORDERED granting Defendant's Motion for Summary Judgment. Because of the questions of fact set forth above,

IT IS FURTHER ORDERED denying Defendant's Motion for Summary Judgment re: the Duty to Defend after the execution of the second contract. Finally, as to the first subcontractor agreement,

IT IS ORDERED denying Century's Motion for Summary Judgment re: the Duty to Defend.

Alvin Concrete, *et al*, maintain that the duty to indemnify is not proper until there is a finding of fault, and there is an issue of fact as to what caused the damages. As to the duty to defend, Alvin Concrete argues that Defendants failed to properly tender the defense of their case and that the duty is not specifically stated in the subcontractor agreement.

With respect to the duty to indemnify, the Court finds that there is no present duty to do so, and there is a question of fact as to whom or what caused the defect. Therefore,

IT IS ORDERED denying Defendants' Motion for Summary Judgment as it pertains to indemnification.

As to Alvin's duty to defend, the Court finds that the duty, as discussed above, is contained in the language "hold Contractor harmless." The Court further finds that Alvin Concrete, Eagle Valley and Gypsum Floor received appropriate tenders of defense. The Court further finds that a tender of defense was never made to Maycon Iron Design or to Arizona Door & Trim. Accordingly, as to Alvin Concrete, Eagle Valley and Gypsum Floor,

IT IS ORDERED granting Defendants' Motion for Summary Judgment.

As to Maycon Iron Design and Arizona Door & Trim,

IT IS ORDERED denying Defendants' Motion for Summary Judgment.

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DHE raises similar arguments: there is no duty to indemnify until there is an obligation, and that a factual determination of fault is required. As to the duty to defend, DHE says Defendants' tender was not explicit, and DHE did not receive a proper tender because it was not made early on in the case. DHE also argues that the duty to defend creates a conflict of interest because liability could be imposed on one of many subcontractors or because of the Defendants' sole negligence.

For the reasons stated above regarding the issue of indemnity,

IT IS ORDERED denying Defendant's Motion for Summary Judgment.

The Court finds that the Mirage Defendants properly tendered the defense to DHE. The Court further finds that there is no conflict of interest which prohibits DHE from assuming the defense because, first, the duty to defend is separate from the issue of liability. DHE can either appear and defend or decline the tender. This choice does not depend on who is ultimately liable for Plaintiff's damages. Second, DHE has not shown that Plaintiff's claims against the Defendants are outside the scope of any obligation to indemnify, thereby possibly creating a conflict of interest. The determination of whether Plaintiff's claims are outside the scope of the indemnity agreement is usually considered in a separate proceeding. Finally, before much, if any litigation was actually conducted, Defendants tendered the defense to DHE. Thus, there was little or no prejudice to the Third-Party Defendant. Therefore,

IT IS ORDERED granting Defendant's Motion for Summary Judgment as to the duty to defend.

Third-Party Defendant Jedco Construction, ACC responds to Defendants' Motion for Partial Summary Judgment re: Contractual Indemnity and Defense Obligations by arguing that material issues of fact exist and that Mirage Homes, LLC is not entitled to summary judgment because it was never a party to any contract involving Jedco. Jedco admits that a tender of defense was made to it, but that the duty to defend has not yet accrued or is precluded because of an inherent conflict of interest. Jedco also alleges that the duty to indemnify has not accrued. For the reasons set forth above,

IT IS ORDERED denying Third-Party Defendants' Motion for Partial Summary Judgment re: Contractual Indemnity.

With respect to Defendants' Motion re: defense obligations,

The Court finds that proper tender of defense was made and, for the reasons above, Jedco has the duty to defend the Defendants. Accordingly,

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IT IS ORDERED granting Defendant's Motion for Partial Summary Judgment on the Duty to Defend.

As with all the Third-Party Defendants who have been presented with a tender of defense, it is up to Jedco to decide whether it wishes to accept or deny the tender of defense.

As to Third-Party Defendant Sunrise Stucco, Inc.'s Motion for Summary Judgment re: No Right to Common Law Indemnity,

The Court finds that implied indemnity is unavailable in this situation where the parties have entered into a written contract containing an indemnity provision. *See* INA Insurance, *supra*. Accordingly,

IT IS ORDERED granting Sunrise Stucco's Motion for Summary Judgment.

Jordan moves for summary judgment on the issue of whether it owes Mirage Homes a duty to indemnify. Jordan alleges there was no agreement that it was to install any windows, nor any evidence that Jordan actually installed windows at the project. Mirage responds that the defects alleged by Plaintiff are at least in part due to Jordan's manufacture of the windows and that there is a question of fact as to whether Jordan also assisted in the installation process. Finding that genuine issues of material fact exist,

IT IS ORDERED denying Jordan's Motion for Summary Judgment.

Third-Party Defendant Markham, Inc. ("Markham") has moved for partial summary judgment re: express contractual claims, arguing that the indemnity provision does not apply. The basis for this argument is that Markham started the Mirage Crossings project without a contract but, before the job was finished, signed a subcontractor agreement. Markham maintains that the parties intended that the contract only apply to those jobs that began after the signing of the contract.

While Defendants argue that the contract was to apply from its effective date, the Court finds that the applicability of the agreement must be determined by the intent of the parties; therefore, it is a question of fact. Accordingly,

IT IS ORDERED denying Markham's Motion for Summary Judgment.

Markham also moves to dismiss Defendants' breach of implied warranty claim, and Century has joined in the motion. These Third-Party Defendants assert that such a warranty is

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intended to provide a claim to the homeowner against the homebuilder, not to the homebuilder against the subcontractors. Defendants maintain that their claim is based on a different warranty, the “implied warranty of good workmanship,” and it provides the homebuilder with a cause of action against its subcontractors. Defendants cite numerous cases, but they all were brought by the actual property owner. Here, the title to the property was vested in the individual unit owners and not with the Defendants. Finding that there is no real distinction between the alleged warranties and that the Defendants lack standing to bring their claim,

IT IS ORDERED granting Markham’s and Century’s Motion to Dismiss Implied Warranty Claim.