District Court, Adams County, Colorado
1100 Judicial Center Drive
Brighton, Colorado 80601

Safeway, Inc.; and Michael Arellano,
Plaintiffs,

v.

Martinson Snow Removal, Inc.,
Defendant.

▲ **COURT USE ONLY** ▲

Case Number: **08 CV 44**

Division: C Courtroom: 601/505

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR DETERMINATION OF AN ISSUE OF LAW

This case was before the court on December 8, 2008, for review of the parties' cross-motions for summary judgment and defendant's motion for determination of an issue of law. The court has reviewed the motions, the responses and replies, and the pertinent portions of its file. Being therefore fully advised in the premises, the court makes the following findings, conclusions of law, and orders:

Summary judgment is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact. Urban v. Beloit Corp., 711 P.2d 685 (Colo. 1985). The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. The party against whom summary judgment might otherwise be entered is entitled to the benefit of all favorable inferences that may be drawn from the facts. Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Huydts v. Dixon, 606 P.2d 1303 (Colo. 1980).

As a general rule, issues of fact should not be determined on a motion for summary judgment. However, once the moving party affirmatively shows specific facts probative of the rights to judgment, it becomes necessary for the nonmoving party to set forth facts showing that there exists a genuine issue for trial. The moving party has the initial burden to show that there is no genuine issue of material fact. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987). When a party moves for summary judgment on an issue upon which that party would not bear the burden of persuasion at trial, the moving party's initial burden of production may be satisfied by showing an absence of evidence in the record to support the non-moving party's case. Casey v. Christie Lodge Owners Ass'n, 923 P.2d 365 (Colo. App. 1996); Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

Once the moving party has met its initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978). The nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. Tapley v. Golden Big O Tires, 676 P.2d 676 (Colo. 1983). All doubts as to whether an issue of fact exists must be resolved against the moving party. Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986).

General Allegations of Fact

To place these matters into context, the court notes these undisputed facts and factual allegations. Plaintiff Arellano was an employee of plaintiff Safeway. As he was leaving a store operated by Safeway, he alleges that he slipped and fell on ice or snow in the parking lot outside the entrance to the store. Plaintiff Arellano was injured and sought worker's compensation from Safeway. That matter was settled. Safeway had contracted with defendant Martinson for the removal of snow and ice from its store premises. Both plaintiffs in this action now seek compensation for plaintiff Arellano's injuries from defendant Martinson.

Plaintiff Safeway's Motion for Partial Summary Judgment

In the motion for partial summary judgment filed by Safeway, it claims that it is entitled to judgment as a matter of law against Martinson pursuant to an indemnity agreement found in the contract between these parties. Interpretation of a contract, including the determination as to whether it is ambiguous, is a question of law for the court to decide and it is therefore appropriate to address this issue at this juncture. See Specialized Grading Enterprises, Inc. v. Goodland Const., Inc., 181 P.3d 352 (Colo. App. 2007). A contract is ambiguous only if it is fairly susceptible of more than one reasonable interpretation. Kaiser v. Market Square Discount Liquors, Inc., 992 P.2d 636 (Colo. App. 1999). Where an indemnity agreement does not absolve the indemnitee of responsibility for its own negligent acts, it is subject to the same rules of construction as a contract generally. Boulder Plaza Residential, LLC v. Summit Flooring, LLC, ___ P.3d ____, 2008 WL 1746059 (Colo. App. 2008). A contract is to be interpreted in its entirety to harmonize and to give effect to all provisions, if possible. Pepcol Mfg. Co. v. Denver Union Corp., 687 P.2d 1310 (Colo. 1984). Thus, an indemnity provision in a contract should be enforced according to the plain and generally accepted meaning of its language and interpreted in its entirety to give effect to all of its provisions so that none are rendered meaningless. Mid Century Ins. Co. v. Gates Rubber Co., 43 P.3d 737 (Colo. App. 2002).

It is undisputed that Safeway and Martinson had entered into a contract for the latter to remove snow and ice from the premises of the former. That contract provides an indemnity clause in paragraph 2(A):

> [Martinson agrees:] To indemnify and hold Safeway harmless from and against all claims, demands, actions or losses, that may arise or be asserted for injuries, damage, or loss received or incurred or alleged to have been received or incurred by any person, including employees of Safeway as a result of willful or negligent conduct on Safeway's premises, en route thereto, or departing therefrom, in performing [the contracted] services. [Martinson] shall have the right to defend any such claim, demand, or action and Safeway shall not compromise same without [Martinson]'s consent.

The contract is accompanied by three additional documents, denominated here as Exhibits A through C. Exhibit A generally sets forth the work Martinson agreed to perform and the costs associated therewith. In paragraph G of Exhibit A, there is another indemnity provision:

> [Martinson] does hereby indemnify and hold Safeway harmless from and against all costs or liability (including attorneys' fees) arising out of claims, suits, or other proceedings made or brought against Safeway on account of its participation in this agreement, and said indemnification shall continue in effect after expiration or termination of this agreement.

Exhibit B provides the specifications Martinson was required to meet in performing its duties under the contract. For purposes of this order, it is necessary only to note that Martinson was required to perform a morning and an evening clean-up, plus additional clean-up during working hours upon more than 2 inches of snow accumulation and a final clean-up within three hours after the end of a storm. In performing its snow removal duties under the contract, Martinson was specifically required to use an appropriate means to remove ice on walkways and in the parking lot.

Exhibit C is entitled "Independent Contractor Agreement" and provides generally that Martinson is an independent contractor, will not pursue a claim for workers compensation against Safeway, and will provide workers compensation insurance of its own in the event it elects to hire employees to perform its obligations under the contract. Exhibit C ends with another indemnity provision, denominated paragraph 3:

> For and in consideration of the privilege of performing certain agreed upon or contracted for services on behalf of Safeway Inc., [Martinson] agree[s] to indemnify Safeway Inc., and their agents and employees, and hold them harmless from and against any [and] all claims or causes of action of any sort arising out of or in connection with the performance of this contract or agreement, whether caused by the active or passive negligence of Safeway Inc., unless caused by the sole negligence or willful misconduct of Safeway Inc.

Exhibit A is incorporated into the services contract by the express terms of the services contract; Exhibits B and C are not. Exhibit A was simply initialed by the parties. Exhibit B, as submitted by both parties, does not appear to be executed at all. Exhibit C contains only the signature of Martinson's president acknowledging its provisions.

Safeway claims it is entitled to summary judgment in its favor based on the indemnity agreement in paragraph 3 of Exhibit C. Safeway argues that this provision requires Martinson to indemnify and hold Safeway harmless "from and against any [and] all claims or causes of action of any sort arising out of or in connection with the performance of this contract or agreement." Safeway concludes that "this contract or agreement" refers to the services agreement because Exhibit C is merely a part of that contract. However, the court disagrees. Exhibit C is a stand-alone agreement, plainly entered into *in conjunction* with the services agreement, but it is not incorporated into the services agreement by reference or clear implication. Thus, the indemnity provision in Exhibit C applies only to Martinson's performance of the Independent Contractor Agreement and not to its performance of services under the services agreement.

Because Safeway and Arellano assert claims relating to allegedly deficient performance of the services agreement, the controlling indemnity provision is the one contained in paragraph 2(A) of the services agreement, modified by the terms of the further indemnity agreement contained in paragraph G of Exhibit A. The former provision provides that Martinson generally indemnifies Safeway against claims arising out of Martinson's performance of the contract, with various limitations on the scope of the indemnity and with a specific authorization for Martinson to participate in the resolution of any such claim. The latter provision indicates that the indemnity continues after the contract is terminated and expands the indemnity to include attorney fees incurred by Safeway in handling claims. Thus, the two provisions can be read together and harmonized, the latter expanding the scope of the former to some degree but with no conflict between them and thus no ambiguity. See Kaiser v. Market Square Discount Liquors, Inc., supra.

Based upon that conclusion, Safeway is not entitled to judgment in its favor as a matter of law. At the very least, Martinson asserts that a precondition to enforcement of the applicable indemnity provision was not met by Safeway: Martinson's right to participate in resolution of Arellano's claim against Safeway. Because there exists a disputed issue of material fact, summary judgment in favor of Safeway is precluded. See Ginter v. Palmer & Co., supra (summary judgment is precluded when there are disputed issues of material fact).

Defendant Martinson's Motion for Partial Summary Judgment

Defendant Martinson asserts that it is entitled to summary judgment in its favor because there is no evidence to establish that it knew or reasonably should have known of a dangerous condition upon the Safeway premises, that plaintiff Arellano's injuries were caused by a condition within the scope of defendant's duty pursuant to contract, or, in the alternative, that there is no evidence that it breached its duty to plaintiff Arellano under the terms of its contract with Safeway. The court agrees with defendant as to the latter argument.

Pursuant to its contract with Safeway, defendant was required to clear the parking lot only upon an accumulation of more than two inches of snow. Incidental to that obligation was a requirement that "sand and/or ice melt" be applied as needed. However, the written contract makes it clear that defendant had no obligation to independently perform ice abatement operations in the parking lot and driving lanes, where plaintiff Arellano suffered his fall and injuries, absent a snow accumulation of at least two inches. Plaintiffs have not established, and it appears to be undisputed, that snow had not accumulated to a depth of two inches or more to trigger defendant's duty to clear snow from the parking lot and, incidental thereto, to apply sand and/or ice melt as needed. While it is undisputed that defendant had personnel on the premises clearing a minor snow accumulation on sidewalks, defendant had no legal duty to inspect or perform operations on the parking lot area absent a specific request from Safeway or a snow accumulation of more than two inches. Accordingly, defendant is entitled to summary judgment in its favor because it had no legal duty to act to prevent plaintiff Arellano's injuries. See Henderson v. Master Klean Janitorial, Inc., 70 P.3d 612 (Colo. App. 2003) (the scope of the duty of a contractor of a landowner in a premises liability action is limited to the performance required in the contract).

Defendant Martinson's Motion for Determination of a Matter of Law

Defendant Martinson seeks a determination as a matter of law as to whether certain affirmative defenses are available in this premises liability action. However, this issue is moot in light of the court's determination as to the preceding issue.

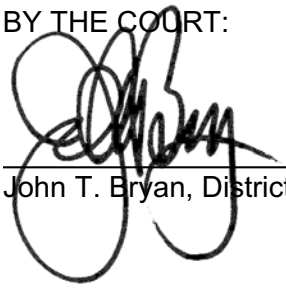
Accordingly, the court ORDERS:

1. Plaintiff Safeway's motion for summary judgment is DENIED for the reasons stated above.

2. Defendant Martinson's motion for summary judgment is GRANTED for the reasons stated above. The case is DISMISSED WITH PREJUDICE.

Dated: December 26, 2008

BY THE COURT:



John T. Bryan, District Court Judge