IN THE COURT OF APPEALS OF IOWA

No. 8-444 / 07-1422
Filed August 27, 2008

CORPORATE LODGING CONSULTANTS, INC.,
Plaintiff-Appellant,

vs.

RAMJI CORPORATION,
Defendant-Appellee.

Appeal from the Iowa District Court for Lee (North) County, Michael J. Schilling, Judge.

The plaintiff appeals from the denial of its action seeking indemnity against the defendant. **AFFIRMED.**

Brent Ruther of Aspelmeier, Fisch, Power, Engberg & Helling, P.L.C., Burlington, for appellant.

John Wright of Wright Law Firm, Fort Madison, for appellee.

Considered by Vogel, P.J., Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

Corporate Lodging Consultants, Inc. (CLC), is a corporation that arranges for the lodging of employees of the Union Pacific Railroad Company (UPRC). Among other such arrangements, it had entered into an agreement with the Days Inn Motor Lodge, a Fort Madison hotel owned and operated by Ramji Corporation, whereby the hotel would provide a certain number of rooms to UPRC employees at a set price.[1] The contract entered into between CLC and the hotel contained the following indemnification clause:

> Hotel agrees to indemnify and hold harmless CLC and COMPANIES from all claims, demands, costs, and expenses for any injury, death, property damage, or any other loss incurred by CLC and COMPANIES or their employees, agents, or others staying at HOTEL or in HOTEL'S charge regardless of the nature of the claim or the theory of recovery asserted against CLC or COMPANIES, including claims that CLC or COMPANIES were at fault, negligent, or strictly liable.

In early May 2001, UPRC train engineer Robert Stephens stayed at the hotel in the course of his employment. While descending the stairs from the second floor he fell, suffering a serious knee injury. Stephens and his wife subsequently filed suit against UPRC and the hotel under the Federal Employees Liability Act (FELA) in federal court in St. Louis, Missouri. The hotel was dismissed for lack of jurisdiction. CLC was not made a defendant in this suit.

In late January 2004, Stephens and his wife settled their FELA action for $103,000. The settlement, by its terms, released UPRC, CLC, Burlington Insurance Company, Best Western International, Inc., and Iowan Motor Lodge.

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[1] The agreement was originally between CLC and Best Western Iowan Motor Lodge. The Best Western later became a Days Inn and the agreement carried over to bind the new hotel owner.

The settlement further provided that it "does not intend to release any claims which [CLC] or [UPRC] may have against any Days Inn entity . . . but specifically reserves the right for the Releases to proceed on any and all claims, including but not limited to any and all claims against the hotel for indemnity and contribution . . . ."

On December 30, 2004, CLC filed a petition against Ramji seeking both contractual and common law indemnity for the sums paid out in its settlement with the Stephenses. Following a trial, the district court first held that Ramji was indeed bound by the indemnity agreement with CLC. However, it denied CLC its requested recovery after finding that CLC had failed to introduce into the record any evidence that would establish it paid out any funds under the settlement. Rather, the court found, the evidence indicated the settlement was most likely paid out by Burlington Insurance Group and/or UPRC. CLC appeals from this ruling, claiming the court erred in concluding its claim failed for lack of proof that a loss was sustained.

Standard of Review.

We review this equity action de novo. Iowa R. App. P 6.4. We give weight to the trial court's fact findings but they are not binding upon us. Iowa R. App. P. 6.14(6)(*g*).

Indemnification.

Generally, "[i]ndemnification is a form of restitution . . . ." *Iowa Elec. Light & Power Co. v. Gen. Elec. Co.*, 352 N.W.2d 231, 236 (Iowa 1984). It can be implied by law in tort claims to shift liability for an obligation to the party who should bear ultimate responsibility for it under principles of equity, or it can be

based on contract. *See Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001); *Farmers Coop. Co. v. Stockdales' Corp.*, 366 N.W.2d 184, 186 (Iowa 1985). In the absence of a duty imposed by law to indemnify another, there is no right to indemnification unless derived from a contract. *See Haynes v. Kleinewefers & Lembo Corp.*, 921 F.2d 453, 456 (2nd Cir. 1990).

In analyzing Ramji's liability under the indemnification clause, the district court here distinguished between indemnification agreements that indemnify against "loss or damage" versus agreements that indemnify against mere liability. In the latter, the court reasoned the triggering event for the indemnification is simply an adjudication of liability. In the case of an indemnity clause covering against loss or damage, the court noted that the indemnitee must suffer "actual loss" in order to recover. Finding that the clause in question here was one covering against loss or damage, the court determined "CLC has the burden to show actual loss or damage by paying a claim for which it is entitled to indemnity from Ramji." After searching the record, the court found no evidence that CLC actually made any payments under the settlement. Accordingly, because the evidence was within their possession or control, and CLC failed to produce any proof it had suffered an actual loss, it denied CLC's request for indemnification from Ramji.

Many Iowa cases have stated that as a general rule an action for indemnity or contribution accrues or becomes enforceable only when the indemnitee's legal liability becomes fixed or certain as in the entry of judgment or a settlement. *Vermeer v. Sneller*, 190 N.W.2d 389, 392 (Iowa 1971).

Furthermore, "[n]ormally, a judgment in the underlying action will establish the essential liability to pursue indemnification." *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 575-76 (Iowa 2002).

This general rule, however, has been further explained by our supreme court. On this issue, it has commented:

> We [have] distinguished an agreement to indemnify from a promise to do a particular act or make a specific payment. *In an agreement to indemnify, a cause of action does not accrue unless and until some actual loss or damage has been suffered*. In contrast, where the promisor promises to do a certain act or make a specific payment, an action for breach of contract accrues when the time for doing such an act or making such payment has occurred and the promisor has failed to perform. Under these circumstances, it is no defense that the promisee has not been damaged.

Becker v. Cent. States Health & Life Co. of Omaha, 431 N.W.2d 354, 357 (Iowa 1988) (citations omitted and emphasis added), *rev'd* on other grounds by *Johnston Equipment Corp. of Iowa v. Industrial Indem.*, 489 N.W.2d 13 (Iowa 1992).

Moreover, a federal case, *Kaydon Acquisition Corp. v. Custum Mfg., Inc.*, 301 F. Supp. 2d 945, 959-60 (N.D. Iowa 2004), has interpreted Iowa law to read that an "actual loss" must occur before the indemnification obligation arises. In other words, mere liability, be it by way of an adjudication or settlement, without payment, is insufficient to trigger an indemnity right. Finally, one treatise has defined "indemnity agreement" as a "specialized form of contract wherein the indemnitor is not liable until the indemnitee actually makes payment or sustains a loss," C.J.S. *Indemnity* § 1, at 94 (2007), and has stated that "the measure of damages is the loss actually sustained or the amount actually paid." *Id.* at § 23.

Upon our de novo review, as we are dealing with an indemnity clause rather than a mere promise to pay or to do some act, we look to the record to determine whether the evidence supports that CLC sustained "actual loss" by making a payment under the settlement agreement. Like the district court, we find such evidence lacking. No testimony or documentary evidence supports that CLC sustained any out-of-pocket expenses following the settlement. While there certainly is substantial evidence of the settlement and that CLC was indeed a party to that settlement, it is just as likely from the scant evidence presented that another party to the settlement—UPRC or Burlington Insurance Company—paid the settlement. Indeed, CLC's petition references "Burlington Insurance Group which paid the defense cost and judgment . . . ." As the district court found:

> [t]here is no evidence that the insurance company or UPR in turn made a demand to CLC to reimburse defense costs or settlement costs. Likewise, there is no evidence CLC was required by UPR or the insurance company to pay any losses or damages arising out of the events of May 5, 2001 involving Mr. Stephens.

We agree. On this record, it would be speculation to find that CLC sustained actual loss. We therefore affirm the judgment of the district court.

AFFIRMED.