



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 9, 2024

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Ryan M. Probasco
10605 Judicial Drive, Building A-4
Fairfax, VA 22030

Jesse S. Keene
Cozen O'Connor PC
1200 19th Street, Suite 300
Washington, D.C. 20036

Re: 5513 6129 Leesburg Pike, Falls Church, LLC v. Paramount Construction Services, LLC, et al., CL 2022-411

Dear Mr. Probasco and Mr. Keene:

This matter is now before the court on the Amplified Demurrer of Defendant Paramount Construction Services, LLC (hereinafter "Paramount"). Oral argument was heard by the court on March 22, 2024, at which time the matter was taken under advisement.

LEGAL STANDARD

"The purpose of a demurrer is to determine whether a [complaint] states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof." (citations omitted).

Seymour v. Roanoke County Board of Supervisors, 301 Va. 156, 164 (2022).

Moreover, the court must "accept as true all factual allegations expressly pleaded in the complaint and interpret those allegations in the light most favorable to the plaintiff." Coward v. Wellmont Health

System, 295 Va. 351, 358 (2018). In addition:

documents brought into a case as a result of a motion craving oyer are incorporated into the pleadings and may be used to "amplif[y]" the facts alleged in a complaint when a court decides whether to sustain or overrule a demurrer. (Citations omitted). Furthermore, "a court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings." (Citations omitted).

EMAC v. County of Hanover, 291 Va. 13, 21 (2016).¹

FACTS

Plaintiff alleges that it owns the Property at 6129 Leesburg Pike, that it entered into a contract with Paramount to install clothes washers and dryers in individual units at the Property, and that, in the process, Paramount (or one of its subcontractors) negligently severed a water pipe, which caused significant damage to the Property. *Amended Complaint* ¶¶ 6, 12, 13.² Plaintiff filed a claim with its property insurance carrier, Chubb, seeking \$3,877,244.68 for actual damages (\$3,193,061.68 to remediate the Property and \$684,183 for lost income, hotel expenses, and rent concessions). *Amended Complaint* ¶¶ 21, 22.

The Chubb insurance policy only covered debris removal to the extent of "25% of the direct physical loss or damage plus an additional \$25,000" *Amended Complaint* ¶ 24. Chubb valued the direct physical loss or damage to be \$1,501,769.41, so that the maximum debris removal coverage was \$375,442.35 plus \$25,000, a total of \$440,442.35. *Amended Complaint* ¶ 25. Plaintiff's debris removal costs were \$1,304,707, leaving an uncovered debris removal damage of \$904,264.65. *Amended Complaint* ¶ 26.³ Plaintiff's Adjustor and Legal Costs of \$199,257.01 were not covered by the Chubb insurance policy. *Amended Complaint* ¶ 27.

Chubb ultimately agreed to pay Plaintiff \$2,598,918.41. *Amended Complaint* ¶ 28. The actual damages exceeded the Chubb payment by \$952,020.90. *Amended Complaint* ¶ 29.⁴ Plaintiff is thus seeking damages

¹ In response to a motion craving oyer, Plaintiff filed, on March 1, 2024, a copy of the Chubb Insurance contract.

² The contract was attached to the *Amended Complaint* as Exhibit A.

³ The court notes that \$1,304,707 - \$440,442.35 = \$864,264.65, not \$904,264.65. For purposes of Paramount's demurrer, this apparent error is not material.

⁴ If Chubb paid Plaintiff \$2,598,918.41, but the actual damages exceeded the Chubb payment by \$952,020.90, Plaintiff's actual damages were \$3,550,939.31. The court is not clear why Plaintiff's claim to Chubb was for \$3,877,244.68

against Paramount in the amount of \$952,020.90. *Amended Complaint* ¶ 41.

The basis for Plaintiff's claim is that Paramount "materially breached the Contract by refusing to indemnify [Plaintiff] for the uncovered portion of its Total Damages." *Amended Complaint* ¶ 42.⁵ The indemnity provision upon which Plaintiff relies is Contract Article 9.15.1, the pertinent language of which is set forth in the *Amended Complaint* at ¶ 11:

To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, the Owner's representative, landlord, Architect, Architect's Consultants and the Agent's representatives and employees of any of them (the "Indemnified Parties" and each, an "Indemnified Party") from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees ("Claims"), arising out of or resulting from performance of the Work, including loss of use resulting therefrom, caused in whole or in part by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such Claim is caused in part by the negligence of a party indemnified hereunder. (ALL CAPS from original removed for readability).

Thus, if Paramount is not liable to Plaintiff pursuant to Contract Article 9.15.1, the *Amended Complaint* does not state a cause of action upon which the requested relief can be granted.

PARAMOUNT IS NOT LIABLE PURSUANT TO CONTRACT ARTICLE 9.15.1

Plaintiff's sole allegation in the *Amended Complaint* concerning breach of contract is that Paramount is liable for damages pursuant to Contract Article 9.15.1. See *Amended Complaint* ¶¶ 11, 30-34, 38, 42-43.⁶

(\$3,193,061.68 to remediate the Property and \$684,183 for lost income, hotel expenses, and rent concessions). For purposes of Paramount's demurrer, however, this fact is not material.

⁵ Although ¶ 10 of the *Amended Complaint* refers to Contract Article 9.2.2 (Paramount "shall be responsible to [Plaintiff] for acts and omissions of [Paramount's] employees, Subcontractors, . . . and other persons or entities performing portions of the Work for or on behalf of [Paramount] or any of its Subcontractors"), the *Amended Complaint* does not assert liability against Paramount based on Contract Article 9.2.2 or for negligence.

⁶ Despite the allegation in ¶ 42 of the *Amended Complaint* that Paramount breached Contract Article 9.15.1, much of Paramount's *Amplified Demurrer* addresses Contract Article 17.3 (Property Insurance) and the Chubb insurance policy. Because a demurrer tests whether a complaint states a cause of action upon which the requested relief may be granted, in deciding Paramount's

Contract Article 9.15.1 is, however, an indemnity provision, which means that it protects Plaintiff from claims *by third parties* against Plaintiff as a result of injuries "arising out of or resulting from performance of the Work" by "the Contractor" (or a Subcontractor or "anyone directly or indirectly employed by them or anyone for whose acts they may be liable"). See e.g., *Southern R. Co. v. Arlen Realty & Development Corp.*, 220 Va. 291, 296 (1979) ("Unless the contract of indemnity provides otherwise, the indemnitee's failure to give the indemnitor timely notice of and an opportunity to defend against the *third party's claim* does not bar recovery by the indemnitee against the indemnitor") (emphasis added), *Hiatt v. Lake Barcroft Community Ass'n*, 244 Va. 191, 195 (1992) ("this Court's decisions after *Johnson* have been limited to upholding the right to contract for . . . *indemnification from liability to third parties* for such damage") (emphasis added), *Farmers Ins. Exchange v. Enterprise Leasing Co.*, 281 Va. 612, 619 (2011) ("the indemnification provision . . . required [renter] to indemnify Enterprise for *damages paid to the third party*") (emphasis added), and *Safeway, Inc. v. DPI Midatlantic, Inc.*, 270 Va. 285, 287 (2005) ("if Safeway was found liable for Williams' alleged injuries, then Safeway was 'entitled to full and complete indemnity, via contract . . . from DPI'" as "Safeway and DPI had entered into a written agreement of indemnification"). Thus, Contract Article 9.15.1 appears not to provide the basis for a cause of action for Plaintiff.⁷

A review of the language of Contract Article 9.15.1 evidences that it was intended not as a basis for a cause of action by Plaintiff against Paramount, but as a protection for Plaintiff against claims by third parties who have suffered a loss as a result of negligence by Paramount.

In the first line, Paramount agrees to "indemnify" Plaintiff,

demurrer, the court will only consider the allegations of the *Amended Complaint*, in which Plaintiff alleges only liability pursuant to Contract Article 9.15.1, and the parties' arguments related thereto. Thus, the arguments concerning Contract Article 17.3 (Property Insurance) and the Chubb insurance policy, which are in the nature of a plea in bar, are not material and will not be considered.

⁷ *C & P Telephone v. Sisson and Ryan, Inc.*, 234 Va. 492 (1987) is not to the contrary. In *C & P Telephone*, C & P's "post-trial . . . claim for attorneys' fees" was denied. 234 Va. at 494. The Supreme Court reversed, holding that "C & P is entitled to recover its attorneys' fees from S & R pursuant to paragraph 4.18.1 of their contract." The Court, however, did not set forth any analysis of paragraph 4.18.1 supporting its conclusion, stating only: "S & R contracted in paragraph 4.18.1 to pay C & P's attorneys' fees in certain situations, and we think the present situation falls fairly within the terms of that agreement." 234 Va. at 503. Importantly for the case at bar, *C & P Telephone* did not address whether paragraph 4.18.1 was, or could be, a basis for damages liability of the contractor.

"defend" Plaintiff, and "hold" Plaintiff "harmless" ⁸ In interpreting that phrase, the court is guided by the maxim *noscitur a sociis* (associated words):

[W]hen general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.

Commonwealth v. United Airlines, Inc., 219 Va. 374, 389 (1978).

The most specific word is "defend"; thus, the words "indemnify" and "hold harmless" must be construed to embrace only the concept of "defend." For Paramount to "defend" Plaintiff, there must be an action against Plaintiff by a third party; it would be nonsensical to suggest that Paramount is "defend[ing]" Plaintiff where Plaintiff has brought an action against Paramount for breach of contract.

Further, Paramount has agreed, in pertinent part, to "indemnify, defend, and hold [Plaintiff] harmless":

from and against claims, damages, losses, and expenses . . . arising out of or resulting from performance of the Work . . . caused in whole or in part by [Paramount's] negligent acts or omissions

Accordingly, there must be a "claim[], damages, losses, [or] expenses" caused by Paramount's negligence. Again, the maxim *noscitur a sociis* applies. The specific word in this group is "claims," which would refer to a demand to Plaintiff for compensation "arising out of or resulting from performance of the Work . . . caused in whole or in part by [Paramount's] negligent acts or omissions" It would be nonsensical to suggest that the instant action is a "claim" for which Paramount has agreed to "indemnify, defend, and hold [Plaintiff] harmless" as it is Plaintiff that has brought the action.

Based upon the plain language of Contract Article 9.15.1, Contract Article 9.15.1 does not establish liability for Paramount. Thus, the *Amended Complaint* does not state a cause of action upon which the requested relief may be granted.

CONCLUSION

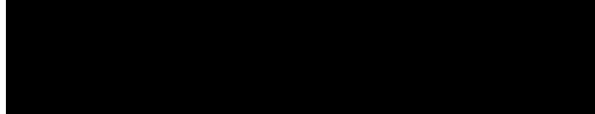
For the reasons set forth above, Defendant Paramount's *Amplified*

⁸ The court recognizes that Paramount has agreed to "indemnify, defend, and hold harmless" not only Plaintiff ("the Owner") but also "the Owner's representative, landlord, Architect, Architect's Consultants and the Agent's representatives and employees of any of them" This expansive list of indemnitees does not impact the court's conclusion that Contract Article 9.15.1 does not provide a cause of action for Plaintiff.

Demurrer is SUSTAINED, with leave to amend, and such an amended complaint shall be filed within 14 days.

An appropriate order will enter.

Sincerely yours, _____



Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR
THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT
PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Ryan M. Probasco
Counsel for Defendant

Jesse S. Keene
Counsel for Plaintiff