STATE OF MAINE BUSINESS AND CONSUMER DOCKET

Cumberland, ss.

HARTFORD FIRE INSURANCE COMPANY

Plaintiff

v. Docket No. BCD-CV-10-41

SPRINKLER SYSTEMS INSPECTION CORP.,

Defendants

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to M.R. Civ. P. 56, Defendant Sprinkler Systems Inspection Corp. (SSIC) has filed a Motion for Summary Judgment on the subrogation claim of Plaintiff Hartford Fire Insurance Company (Hartford). Hartford has filed an opposition. As permitted by M.R. Civ. P. 7(b)(7), the court elects to decide the motion on the filings without oral argument.

Background

Based on a comparison of the parties' respective Statements of Material Fact, the parties agree on the following facts for purposes of the present motion, except as specifically indicated:

Hartford is an insurance company that, among other business activities, provides property insurance. SSIC is in the business of providing inspections of sprinkler systems installed in structures to prevent or limit fire damage.

In 2005, Hartford's insured, Eric Agren, purchased a four-story brick building in Lewiston. Hartford provided Mr. Agren with insurance on the structure under an insurance contract. The upper two floors were intended for residential use, and the lower floors were to be occupied by a restaurant. The building had a wet sprinkler system (meaning that the pipes continuously held water) for the first and second floors, and a dry sprinkler system (meaning

that the pipes were not supposed to contain water except when the sprinkler system was being tested or activated) for the two upper floors.

On or about January 8, 2006, Mr. Agren and SSIC entered into a contract under which SSIC agreed to inspect the sprinkler system in Mr. Agren's building once per quarter for two years, for a fee of $240 per year, or $60 per inspection. The terms of the contract were memorialized in a writing signed by the parties to it, and contained in the record as Exhibit B to SSIC's Motion for Summary Judgment.

The contract consists of a two-page document captioned Contract for the Inspection of Automatic Sprinkler Systems ["the Contract" document], and an attachment captioned SSIC Scope of Inspection Contract ["the Scope document"]. The Scope document is part of the overall contract between Mr. Agren and SSIC.

The Contract document includes an integration provision as well as a provision for Maine law to apply. It also contains the following provision:

> 9. CONTRACTOR NOT INSURER: Owner agrees that Contractor is not its insurer for the value of the premises or contents. The inspection cost set in Paragraph 2 is based solely on the value of the service provided. In case of failure to perform such service and a resulting loss, Contractor's liability under this contract shall be limited to the sum of Ten Thousand Dollars ($10,000.00) as liquidated damages, and not as a penalty, and this liability shall be exclusive barring all other claims by Owner against Contractor for all kinds of loss, including loss of business profits.

The Scope document consists of a detailed specification of the "normal inspection practices being provided as part of the attached contract," including a schedule of the frequency for performing specific tasks. The Scope document contains some further provisions purporting to define and limit SSIC's liability:

> SSIC will check the low point drains annually. The owner is responsible for seeing that the low point drains are checked and maintained throughout the year especially at times when the system may be exposed to freezing temperatures. . . . The owner should check the low points several times throughout the year to remove all water from the system and eliminate the possibility of freezing that could cause damage to the system.

Sprinkler Systems Inspection Corp. assumes no responsibility for any damage that you may incur due to freezing.

On or about February 17, 2006, SSIC through its inspector John Emerson made an inspection of the sprinkler system on all four floors and issued a written report. Mr. Emerson completed a written report of his inspection, indicating no problems found. His report consists of two pages, one for the wet sprinkler system and the other for the dry sprinkler system. Defendant's Motion for Summary Judgment, Exhibit C.

On March 4, 2006, fifteen days after the SSIC inspection, an elbow fitting in that portion of the dry sprinkler system on the fourth floor "froze and blew apart, activating the sprinkler system, which then flooded the property with water." Complaint ¶8. As Mr. Agren's property insurer, Hartford compensated him for losses covered under its insurance contract in an amount taken for purposes of the present motion to be $578,743.

Hartford brought this action as subrogee of Mr. Agren, seeking to recover from SSIC the amount it paid out for the loss. Its complaint asserts that SSIC is liable to it for breach of contract and for negligence. SSIC's answer denies liability and asserts several affirmative defenses, including that its liability is excluded or limited by provisions of its agreement with Mr. Agren.

Analysis

1. The Summary Judgment Standard of Review

Under the well-established framework of the summary judgment rule, Rule 56 of the Maine Rules of Civil Procedure, as the movant, SSIC is required to establish that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. "Summary judgment is appropriate when review of the parties' statements of material facts and the referenced record evidence, considered in the light most favorable to the non-moving party, indicates that no genuine issue of material fact is in dispute." *Blue Star Corp. v. CKF Props. LLC,*

2009 ME 101, ¶ 23, 980 A.2d 1270, 1276 (citing *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821, 825; *Stanley v. Hancock County Comm'rs*, 2004 ME 157, ¶ 13, 864 A.2d 169, 174); *see also* M. R. Civ. P. 56.

Here, although the parties do not necessarily agree on the cause and extent of Hartford's loss, and clearly disagree on whether SSIC should be held liable to Hartford under either of Hartford's two theories of liability—breach of contract and negligence—the focus of SSIC's motion is on the legal interpretation to be given to provisions in what both parties agree was the contract between SSIC and Mr. Agren.

2. The Issues on Summary Judgment

The sole focus of the SSIC motion is on the contractual provisions that SSIC asserts limit or eliminate any liability on its part for Hartford's claim on either of Hartford's legal theories. Thus, whether SSIC actually did breach its contractual obligations for purposes of Hartford's contract count, or any duty of care for purposes of the negligence count, are not issues raised in the motion. Rather, the question is, assuming solely for purposes of SSIC's motion that SSIC did act negligently and/or in breach of its contract, whether terms of the agreement limit or extinguish SSIC's liability under either or both of the counts in Hartford's complaint.

Because Hartford's cause of action is based on its claim to be subrogated to Mr. Agren's rights against SSIC, Hartford is bound by the agreement between Mr. Agren and SSIC to the same extent Mr. Agren would be if he were the plaintiff. *See Maine Municipal Employees Health Trust v. Maloney*, 2004 ME 51, ¶7, 846 A.2d 336, 339.

SSIC argues that its liability is limited in two respects: First, it asserts that the Scope document's provision that "Sprinkler Systems Inspection Corp. assumes no responsibility for any damage that you may incur due to freezing" eliminates any liability for Hartford's claim

because Hartford's claim is for loss due to freezing; second, SSIC asserts that the Contract provision limiting its liability to $10,000 caps its liability to Hartford at that amount, regardless of the nature, cause or legal theory underlying Hartford's claim. Hartford counters by arguing that neither of the provisions is enforceable against it.

Neither party has proffered any extrinsic evidence in the nature of parol evidence in their differing interpretations of the operative provisions of the Contract document and the Scope document. As noted below, the court does perceive some ambiguity in the pertinent provisions. However, because the Contract and Scope documents on their face are SSIC's form documents, any ambiguity is to be construed against SSIC as the drafter. *See John Swenson Granite, Inc. v. State Tax Assessor*, 685 A.2d 425, 428 (Me. 1996).

Thus, this analysis examines each of the two points urged in SSIC's motion—that it has no liability on contract or negligence theory for any loss due to freezing, and that any liability for Hartford's damages claim regardless of theory of liability or causation is limited to $10,000.

1. *Scope Document Provision Regarding Responsibility for Freezing*

SSIC's argument that the provision in the Scope document purporting to relieve SSIC of "responsibility" for damage due to freezing fails at least as to Hartford's negligence claim because it lacks any express provision relieving SSIC of liability for its own negligence.

Maine law is clear that releases purporting to relieve a party from liability for its own negligence are "strictly construe[d] against the party seeking immunity from liability" and will not be enforced absent language that "expressly spell[s] out with the greatest particularity the intention of the parties contractually to extinguish negligence liability." *Lloyd v. Sugarloaf Mountain Corp.*, 2003 ME 117, ¶8, 833 A.2d 1, 4, *quoting Doyle v. Bowdoin Coll.*, 403 A.2d 1206, 1208 (Me. 1979). *See also Emery Waterhouse v. Lea*, 467 A.2d 986, 993 (Me. 1983).

In fact, the release language in *Doyle* that the Law Court held to be insufficient to relieve Bowdoin College of liability for its own negligence was similar to the disclaimer of responsibility language in SSIC's Scope document. *See* 403 A.2d at 1207 ("... *Bowdoin College, its employees or servants will accept no responsibility for* or on account of *any injury or damage* ... arising out of the activities of the said THE CLINIC") (emphasis in original).

In sum, the provision relied upon by SSIC to preclude it from being held liable based on its own negligence for loss due to freezing plainly is insufficient to relieve SSIC of liability for negligence. SSIC's motion will be denied as to the effect of this provision on Hartford's negligence claim.

Turning to Hartford's contract claim, Hartford does not appear to contest SSIC's interpretation of the Scope document to relieve SSIC of liability on a contract theory for loss due to freezing, and focuses solely on whether the provision is sufficient to relieve SSIC of liability for negligence.

Hartford appears to have pinpointed, at least to its own satisfaction, the ultimate cause of the loss as being what it claims is SSIC's failure to check the low point drains in the dry sprinkler system during the February 17, 2006 inspection. Hartford appears to have concluded that the elbow fitting failed due to the presence of water in the dry sprinkler system that would not have been present in the absence of SSIC's alleged breach of contract or negligence.

The SSIC Scope document clearly allocates contractual responsibility for draining the low point drains to the owner, Mr. Agren. On the other hand, SSIC's list of "normal inspection practices" includes a statement that "SSIC will check the low point drains annually." Moreover, the February 17, 2006 report by SSIC's inspector contains an X mark next to the box designated "Low points drained." Whether this means the inspector drained the low points or simply confirmed that they had been drained is unclear.

Because the general disclaimer about loss due to freezing is silent on whether it includes loss suffered as a direct result of SSIC's breach of contract, the resulting ambiguity must be resolved against SSIC as the drafter.

The net result of this analysis is that, assuming Hartford's loss is caused by "freezing", were Hartford to prove breach of contract but not negligence, it would not recover, unless it could prove that the freezing occurred as a direct result of SSIC's failure to "check low point drains" in breach of its contract, meaning essentially that Hartford would have to prove that there was water in the dry sprinkler system as of February 17, 2006 that froze and caused the elbow fitting to rupture 15 days later.

However, if Hartford proves negligence, whether or not accompanied by a breach of contract, the Scope document's provision disclaiming SSIC's responsibility for loss due to freezing does not protect SSIC from being found liable for its own negligence.

2. *Enforceability of "Liquidated Damages" Provision*

Paragraph 9 of the Contract document is ambiguous in a number of respects, some of which are addressed in the parties' filings. For example, does the reference to "failure to perform such service" mean that the provision applies only if SSIC utterly fails to perform—meaning does not show up at all essentially—as opposed to performing the service in breach of contract or negligently? Hartford argues for the narrow interpretation, suggesting that the fact that SSIC did an inspection, albeit negligently or in breach according to Hartford, means that the provision does not apply. SSIC says it applies to any claim arising out of SSIC's service.

An ambiguity that the parties have not addressed is whether the $10,000 figure in Paragraph 9 is a cap or maximum, as the word "limit" would suggest, or a fixed amount due, regardless of the amount of actual damage, as the term "liquidated damages" would suggest.

The combination of the terms implies some confusion in drafting, because a liquidated damages provision is not a cap or upper limit, but rather a fixed amount that serves as a stipulated reasonable substitute for actual damages when actual damages are difficult to prove or establish.

Ultimately, Paragraph 9 is to be construed according to its ordinary meaning, with any ambiguity resolved against SSIC. *See Young v. Hornbrook*, 153 Me. 412, 415, 140 A.2d 493, 494-95 (1958). The phrase, "Contractor's liability under this contract," construed narrowly, limits the scope of Paragraph 9 to contract-based claims. The reference to "liquidated damages" bolsters this interpretation, because a liquidated damages clause is clearly a contractual measure of damages, and has no application in tort.[1]

Admittedly, the last clause of the provision—"and this liability shall be exclusive barring all other claims by Owner against Contractor for all kinds of loss, including loss of business profits"—can be read broadly to extend to any and all claims under any legal theory, but the rule of *Lloyd* and *Doyle* requiring it to be construed strictly applies here,[2] just as it does

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[1] Construed as a provision applicable to Hartford's contract claim only, Paragraph 9 establishes a cap on contract damages, not a fixed amount regardless of how minor the breach. As Hartford argues in its memorandum, this is not a situation in which prospective potential damages due to breach of contract (or negligence for that matter) are difficult to prove. Also, it would be absurd to make SSIC liable for $10,000 for every shortcoming in its contractual performance, no matter how inconsequential or harmless. Thus, despite the confusing reference to liquidated damages, Paragraph 9 requires Hartford to prove its actual damages for breach of contract, but caps its recovery at $10,000. The cap equates to more than 40 times the annual cost of SSIC's service, and more than 160 times the cost of individual inspections, so it does not suffer from the disproportionality featured in the Connecticut case cited by Hartford. *See Mattegat v. Klopfenstein*, 50 Conn. App. 97, 102, 717 A.2d 276 (1998), *cert. denied*, 247 Conn. 922, 722 A.2d 810. For these reasons, this court concludes that Paragraph 9 establishes an enforceable upper limit on Hartford's damages for breach of contract.

[2] While the *Lloyd* and *Doyle* cases involved provisions that purported to extinguish any liability for negligence as opposed to limit the amount of damages recoverable for negligence, the rule logically applies to both situations. *See Sterner Aero AB v. Page Airmotive, Inc.*, 499 F.2d 709, 713-14 (10th Cir. 1974) ("Although a party to a contract may *limit or eliminate* liability for his own negligence if he is on an equal bargaining footing with the other contracting parties, at the

to the Scope document provision regarding "responsibility" for freezing. Because Paragraph 9 fails to contain any express reference to negligence or tort claims, much less any particular disclaimer of liability it is insufficient to extinguish SSIC's liability for its own negligence.

Conclusion

Taken as a whole, the governing contract is interpreted not to eliminate or limit SSIC's liability to Hartford on count II of the complaint, for negligence, and to limit Hartford's recovery on count I, for breach of contract, to $10,000, with the further proviso that any damages under count I for loss caused by freezing are not recoverable at all absent proof that the loss resulted directly from SSIC's breach of an express provision of its Contract and/or Scope document.

IT IS ORDERED AS FOLLOWS:

1. The Defendant's Motion for Summary Judgment is granted in part to the extent expressly provided above, and is otherwise denied.

2. Because discovery in this case was stayed pending resolution of this motion, the Clerk will schedule a Case Management Conference.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this order by reference in the docket.

Dated 19 May 2011

A. M. Horton
Justice, Superior Court

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same time, such contractual provisions are not the favorites of the law and hence are strictly construed.") (emphasis added and citation omitted).