

1-13-1882

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KMART CORPORATION,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 13 L 134
)	
KRC CRESTWOOD 887, INC.,)	Honorable
)	John C. Griffin,
Defendant-Appellee.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held:* Section 2-619(a)(9) dismissal of a complaint raising a breach of the duties to defend and indemnify not warranted where terms of sublease arguably give rise to a duty to defend and duty to indemnify cannot be determined as a matter of law.

¶ 2 Kmart Corporation appeals the trial court's dismissal of its two-count complaint asserting a breach of the duties to defend and indemnify against KRC Crestwood 887, Inc. Kmart claims that the trial court erred in dismissing its complaint because a Kmart customer sustained injuries in a shopping center's common area triggering KRC's duty to defend and indemnify pursuant to

the terms of the sublease executed between the parties. We agree and reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On June 3, 2006, Kmart customer Elizabeth Flores was injured when she fell outside the store in the gutter between the sidewalk adjacent to the store and the parking lot. Flores later sued Kmart and others alleging various causes of action. The trial court, construing the provisions of a lease and sublease for the property, ultimately granted KRC's motion to dismiss Kmart's complaint based on the court's conclusion that KRC owed no duty to defend or indemnify Kmart in connection with Flores' claims.

¶ 5 Bradley Operating Limited Partnership owned the RiverCrest Centre located in Crestwood, Illinois. Bradley, as landlord, executed a lease for the shopping center with KRC, as tenant, which included the following provision regarding the maintenance of the property's common area:

"[Bradley] shall, at [Bradley's] expense, operate, maintain, light, repair, replace and reconstruct the Common Area and all improvements thereon and thereto in good order, repair and condition and in accordance with the practices prevailing in first class shopping centers including, without limitation, all sidewalks; curbs and aisles; Parking areas."

The lease also provided the following indemnification provision:

"[Bradley] shall indemnify, defend and hold [KRC] harmless from all Claims arising from *** any accident, occurrence, injury, loss or damage whatsoever caused to any natural person *** as shall occur in any part of the Center *** except (1) to the extent such Claims arise from willful or negligent act

or omission of [KRC] or its employees, servants or agents and (2) to the extent that [KRC] is responsible pursuant to Section 17.6A."

Section 17.6A, in turn, generally provides that KRC "shall indemnify, defend and hold harmless" Bradley against claims arising from injuries occurring in the demised building, apart from claims resulting from Bradley's negligence.

¶ 6 On July 17, 1998, KRC, as landlord, and Kmart, as tenant, executed a "Net Lease" (the "sublease") for a Kmart store in the shopping center. The sublease was subject to and subordinate to the Bradley/KRC lease.

¶ 7 According to the sublease, the term "common areas" includes the following:

"all areas and facilities erected or situated on the Shopping Center designated and improved for common use, excepting *** (ii) portions of the Shopping Center which are used by only one tenant of the Shopping Center and its employees, agents, customers, invitees and licenses, and (iii) loading docks; *but including*, without limitation, the following areas and facilities to the extent they exist: parking areas; access roads; entrances and driveways; retaining walls; landscaped areas; passageways; sidewalks and curbs (including exterior sidewalks and curbs adjacent to the buildings)." (Emphasis added.)

The sublease defined the "demised premises" as the "Kmart building," meaning "the entire store building on the Property to be used by [Kmart] for operation of a retail or discount retail store" or other permitted use.

¶ 8 Repair and maintenance responsibilities were set forth in section 11.03 of the sublease, which provides in relevant part:

"[KRC] shall assume and be responsible for maintenance, repair, replacement, security, sweeping, snow removal, trash removal and cleaning, and the payment of all costs relating thereto, of the Common Areas, including without limitation all sidewalks (except those adjoining the Demised Premises as hereafter set forth), roadways, parking areas, landscaping and fences within or serving the Shopping Center (such tasks herein referred to collectively as the "CAM") *** [Kmart], *** shall reimburse [KRC] *** for [Kmart's] share of the CAM Costs with respect to the Shopping Center."

¶ 9 Section 13.01 of the sublease detailed Kmart's duty to defend and indemnify KRC:

"Excepting if caused by the negligence or willful acts of [KRC] or its agents or employees, [Kmart] shall defend, indemnify and save harmless [KRC] against and from any and all claims *** arising from conduct or management of or from any work or thing whatsoever done in or about the Demised Premises and the sidewalks, ramps and loading docks adjoining same during the term of this Lease, and will further indemnify and save [KRC] harmless against and from any and all claims *** arising from any act of negligence of [Kmart] *** during the term of this Lease, or arising from any accident, injury or damage whatsoever caused to any person, ***in, on or about the Demised Premises and the sidewalks, ramps and loading docks adjoining same ***.

¶ 10 Section 13.02 defines KRC's duty to defend and indemnify Kmart and provides in relevant part:

"Excepting if caused solely by the negligence or willful acts of [Kmart], *** [KRC] shall defend, indemnify and save harmless [Kmart] against and from any and all claims by *** any person *** [1] arising from conduct or management of or from any work or thing whatsoever done in or about the Common Areas (other than (i) sidewalks,

ramps and loading docks adjoining the Demised Premises, and (ii) the Common Areas for which *** [Bradley] performs the CAM tasks unless [Bradley] indemnifies [KRC] from such claims pursuant to the applicable *** Underlying Lease) *** or [3] arising from any act of negligence of [KRC], *** or [4] arising from any accident, injury or damage whatsoever caused to any person *** occurring in, on or about the Common Area (other than sidewalks, ramps and loading docks adjoining the Demised Premises) and [KRC's] Buildings ***."

¶ 11 At approximately 9:45 p.m. on June 3, 2006, Flores arrived at the shopping center to shop at Kmart. She had previously shopped at this Kmart approximately 50 times and was familiar with the store's parking lot and entranceway. As Flores exited the store after completing her shopping, she turned to look at flowers on display shelves located outside the store and noticed an individual wearing a Kmart uniform and Kmart name tag watering the flowers with a hose. Besides looking at the flowers, nothing else distracted Flores as she left the store. After taking approximately five steps outside of the store and as she stepped off the curb, Flores fell in "kind of gutter area" between the sidewalk and the parking lot. Flores looked down toward the ground as she fell and saw her foot on a Kmart flyer in the middle of a puddle of water measuring approximately three feet by three feet. The flyer looked like Kmart's advertisement typically found in the Sunday paper. Flores did not see the flyer before she fell and did not see any other flyers in the area.

¶ 12 After Flores fell and was lying in the puddle of water, she saw water trickling down from the hose used to water the flowers and it was streaming along the sidewalk forming a puddle in the "gutter." Flores first noticed the puddle of water in the "gutter" when she fell. Flores believed that it was the combination of the puddle and the flyer in the puddle that caused her fall.

¶ 13 On January 5, 2007, Flores filed a negligence claim against Kmart. Flores later filed several amended complaints, with the sixth and final amended complaint filed on March 19, 2009. In the sixth amended complaint, Flores raised a negligence count against Kmart, KRC and Bradley, among others. As the basis for Flores' negligence claims, she asserted that each defendant: (1) negligently failed to check the sidewalks, parking lot and entrance way for debris; (2) negligently failed to remove the Kmart flyer out of the puddle of water; and (3) watered plants outside the Kmart department store allowing an unnatural accumulation of water to develop in the gutter area directly outside of the Kmart store.

¶ 14 Kmart denied all material allegations of Flores' complaint and tendered defense of the case to KRC pursuant to the sublease's terms. KRC refused to defend Kmart.

¶ 15 In response to the sixth amended complaint, KRC filed cross-claims against Kmart and Bradley for contribution or, alternatively, for indemnification. KRC alleged that Flores' injuries resulted from Kmart's negligence and that under section 13.01 of the sublease, KRC was entitled to a defense and indemnification by Kmart. KRC similarly argued that Bradley's negligence caused Flores' injuries and under section 17.6B of the lease, KRC was entitled to a defense and indemnification by Bradley.

¶ 16 Kmart later filed amended cross-claims against Bradley and KRC for contribution and against KRC alleging a breach of contract due to KRC's failure to defend Kmart. In response to Kmart's pleading, KRC filed a motion for summary judgment.

¶ 17 On January 13, 2010, Flores voluntarily nonsuited her claims against KRC. On September 24, 2010, the trial court granted KRC's motion for summary judgment on Kmart's claim for contribution.

¶ 18 On August 20, 2011, Kmart settled with Flores and pursuant to the settlement agreement, paid Flores \$2,250,000. The agreement recited "that the payment made is not to be construed as an admission of liability on the part of [Kmart], and that said releasees deny liability therefore and intend merely to avoid litigation and buy their peace."

¶ 19 On January 5, 2012, the trial court entered an agreed order voluntarily dismissing Kmart's cross-claim against KRC and Bradley and KRC's cross-claim against Bradley and Kmart. On October 29, 2012, Kmart sent KRC a letter requesting indemnification in the sum of \$2,419,081 representing the legal fees and expenses it incurred defending the *Flores* action and the \$2,250,000 paid to settle the case. On December 4, 2012, KRC sent a letter to Kmart unequivocally rejecting its request for indemnification because: (1) Kmart was solely negligent as evidenced by the dismissal of the other defendants on summary judgment; (2) Flores' injury occurred on a sidewalk adjoining the demised premises triggering exception (i) of section 13.02 of the sublease; and (3) Flores fell in the common area maintained by Bradley and Bradley did not indemnify KRC triggering exception (ii) of section 13.02.

¶ 20 On January 4, 2013, Kmart filed this action against KRC claiming that KRC breached its duty to defend and indemnify Kmart pursuant to the terms of the sublease. Kmart asserted that section 13.02 of the sublease imposed a duty on KRC to defend and indemnify Kmart against Flores' claims. By failing to defend and indemnify, Kmart claims KRC breached its contract with Kmart.

¶ 21 On March 14, 2013, KRC filed a section 2-619(a)(9) motion to dismiss asserting that the sublease's language defeated Kmart's claims. On June 4, 2013, the trial court granted KRC's motion to dismiss Kmart's complaint on the ground that Bradley was obligated to maintain the common area consisting of the sidewalks adjacent to the Kmart building and the parking lot,

which was purportedly where Flores' injury occurred. The trial court concluded that because Bradley did not indemnify KRC pursuant to the terms of the Bradley/KRC lease, the proviso language of section 13.02 was triggered relieving KRC of its obligation to defend or indemnify Kmart. Kmart timely appealed.

¶ 22

ANALYSIS

¶ 23 On appeal, Kmart claims that the trial court erred in dismissing both counts of its complaint because Flores' injury occurred in a "common area," which then triggered KRC's duty to defend and indemnify according to the provisions of the sublease. KRC responds that it did not owe Kmart a duty to defend or indemnify under the sublease because those duties only arose: (1) if an injury occurred in a common area *and* (2) if Bradley, as the party responsible for maintaining the common area, indemnified KRC for the injury-related claims. KRC asserts that Bradley's indemnification requirement applies equally to the duty to defend. KRC claims that because Bradley did not indemnify KRC relating to Flores' claims, KRC, in turn, owed no duty to defend or indemnify Kmart. Regardless, KRC asserts that it did not breach any duty owed to Kmart because Flores fell in a puddle of water created by a Kmart employee watering flowers.

¶ 24 Leases are interpreted using the same rules of construction applicable to the construction of other contracts. *Williams v. Nagel*, 162 Ill. 2d 542, 555 (1994). A contract is interpreted according to the plain and ordinary meaning of unambiguous terms. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. Under the "four corners" rule, "[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence." *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v.*

Thompson, 26 Ill. 2d 287, 291 (1962)). To apply the "four corners" rule, courts initially examine the contract's language alone without the aid of parole evidence. *Id.* Interpretation of a lease raises a question of law that we review *de novo*. *Plambeck v. Greystone Management & Columbia National Trust Co.*, 281 Ill. App. 3d 260, 266 (1996).

¶ 25 A motion to dismiss pursuant to section 2-619 "admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "Affirmative matter" includes any defense apart from one that negates the essential allegations of a plaintiff's cause of action. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). We review the trial court's ruling on a section 2-619 motion to dismiss *de novo*. *Burciaga*, 223 Ill. 2d at 59. *Id.* When reviewing a section 2-619 motion to dismiss, the relevant question that we must consider is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Hodge*, 156 Ill. 2d at 115.

¶ 26 Based on a plain reading of the relevant sublease provisions, we disagree with KRC's position on appeal as well as the basis on which the trial court ruled in KRC's favor. A plain reading of section 13.02 contradicts KRC's position that it owed Kmart no duty to defend or indemnify relating to injuries occurring on common areas unless Bradley maintained the common area and first indemnified KRC. Section 13.02 expressly delineates four types of claims – each joined by the disjunctive "or" – giving rise to KRC's duties to defend and indemnify. Section 13.02[1] also expressly delineates two exclusions to the first type of claim that arises "from conduct or management of or from any work or thing whatsoever done in or about the Common Areas." The pertinent exclusion relieves KRC of the duty to indemnify from

any and all claims "arising from conduct or management of or from any work or thing whatsoever done in or about the Common Areas" where "(ii) *** [Bradley] performs the CAM tasks unless [Bradley] indemnifies [KRC] from such claims pursuant to the applicable *** Lease)." Because the relevant exclusionary language is limited to that one type of claim, it is inapplicable to the other instances giving rise to KRC's duties provided in section 13.02. And because Flores' claim did not arise from Bradley's performance of CAM tasks in the common areas, the exclusion relied on by KRC does not apply.

¶ 27 Contrary to KRC's position, the applicable triggering event creating the duty to defend and indemnify relates to the provision in section 13.02[4] obligating KRC to indemnify Kmart: "from any and all claims *** arising from any accident, injury or damage *whatsoever* caused to any person *** occurring in, on or about the Common Area (other than sidewalks, ramps and loading docks adjoining the Demised Premises) and the Landlord's Buildings," excepting if the claim arose "solely" as a result of Kmart's negligence. (Emphasis added.) Pursuant to the plain and unambiguous language of this provision, KRC assumed the liability for any injury to any person occurring in, on or around the common area as signified by the express use of the word "whatsoever" in that section. KRC's obligations under this provision are independent and unrelated to Bradley's performance of CAM tasks. The relevant inquiry then becomes whether Flores' injury occurred in a "common area" and whether Flores' injury was caused solely by Kmart's negligence.

¶ 28 The record reveals, and the parties do not dispute, that Flores' injury occurred in the "gutter" area adjacent to the sidewalk outside the Kmart store. According to Flores, the area where she fell was not exactly the sidewalk adjacent to the store, but it also was not the parking lot. Photographs of the injury site in the record substantiate Flores' recollection. Based on the

record, we cannot conclusively determine that Flores' injury did not occur in a "common area." Consequently, further litigation is necessary to determine whether KRC's duty to "defend, indemnify and save harmless" was triggered by Flores' injury in a common area. Moreover, on this record we cannot say whether Flores' injury was occasioned "solely" by the negligence of Kmart, thus implicating the exception to KRC's obligation to defend and indemnify. As recited in the settlement agreement, Kmart did not admit liability for Flores' injuries and, at this juncture in the proceedings while the evidence certainly indicates that the puddle of water and the presence of the Kmart flyer may have resulted from conduct of a Kmart employee, it is not possible to conclude as a matter of law that Kmart was "solely" responsible for Flores' injuries. Accordingly, we reverse the trial court's order dismissing Kmart's complaint pursuant to a section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2006).

¶ 29 Moreover, the sublease imposes on KRC both the duty to defend and the duty to indemnify and those two duties should not be conflated. The introductory sentence of section 13.02 specifies that KRC "shall defend, indemnify and save harmless [Kmart]" and the section concludes with a sentence stating in part that "in the event that any action or proceeding be brought against [Kmart], [KRC] shall defend [Kmart] in such action or proceeding by counsel reasonably satisfactory to [Kmart]." According to the plain language of the sublease, KRC's duty to defend arose upon the commencement of Flores' action against Kmart. Thus, it would appear that KRC was obligated to defend Kmart through counsel satisfactory to Kmart unless and until there was a basis to conclude that Kmart was "solely" responsible for Flores' injury. On this record certainly no court has made that determination and we are unable to say whether KRC analyzed this issue internally and, if so, whether any conclusion it reached as to Kmart's negligence was supported by facts then known to KRC. Thus, on remand, whether KRC

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breached its duty to defend Kmart must be analyzed separately from the issue of whether KRC is obligated to indemnify Kmart. Since it is undisputed that KRC failed to provide Kmart with a defense in the *Flores* action, this matter must be remanded for a determination of whether that failure constituted a breach of KRC's obligations under the sublease.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the trial court is reversed and we remand for further proceedings consistent with this order.

¶ 32 Reversed and remanded.