STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD) Case No.: 2012-CP-20-316

2014 JAN 23 AM 11 10
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Mary Wall Black,

Plaintiff,

vs.

Bi-Lo, LLC & Unifirst Corporation,

Defendants.

ORDER GRANTING DEFENDANT/CROSS-CLAIM DEFENDANT UNIFIRST CORPORATION'S MOTION FOR SUMMARY JUDGMENT AS TO BI-LO, LLC'S CROSS-CLAIMS

This matter came before the Court on Defendant/Cross-claim Defendant Unifirst Corporation's ("Unifirst") Motion for Summary Judgment filed on October 22, 2013 and heard on January 9, 2014. Present at the hearing were Lindsay A. Joyner, counsel for Unifirst, and Ryan C. Holt, counsel for Bi-Lo, LLC ("Bi-Lo"). For the foregoing reasons, Unifirst's Motion is granted.

BACKGROUND

The underlying lawsuit arises from an alleged trip and fall in the Bi-Lo grocery store located in Winnsboro, South Carolina, wherein Plaintiff alleged negligence and gross negligence on the part of Bi-Lo, LLC ("Bi-Lo") and Unifirst. In addition to the underlying personal injury action, Bi-Lo and Unifirst each alleged cross-claims arising from this incident. Bi-Lo's cross-claims against Unifirst allege contribution and indemnification, based on both the agreement between Bi-Lo and Unifirst and the special relationship between the two, for any negligence found. Bi-Lo's cross-claims assert Unifirst is liable to it because any negligence found to be committed by Bi-Lo was jointly committed with acts of negligence of Unifirst; any liability for which Bi-Lo is found to have committed is due to Unifirst's negligence and arises from the special relationship between Bi-Lo and Unifirst; and the contract between Bi-Lo and Unifirst states that Unifirst must indemnify and

hold Bi-Lo harmless.

Unifirst first moved for summary judgment as to all of Plaintiff's claims against it pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, alleging there was no genuine issue as to any material fact. By Order dated October 14, 2013 ("October 14 Order"), Unifirst's Motion for Summary Judgment was granted, dismissing Plaintiff's claims against Unifirst as a matter of law.[1] Additionally, Bi-Lo's cross-claims were severed from the underlying action by the October 14 Order. Following the October 14 Order, Unifirst moved for summary judgment as to Bi-Lo's cross-claims against it pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure.

LEGAL ANALYSIS

Bi-Lo's cross-claims against Unifirst cannot be sustained because Unifirst cannot be found liable to Plaintiff. There is no genuine issue as to any material fact; therefore, Unifirst is entitled to judgment as a matter of law on all of Bi-Lo's cross-claims against it because: (1) the right of contribution does not exist under the facts of this case; (2) the elements necessary for equitable indemnity are not present in this case; and (3) the contract between Unifirst and Bi-Lo does not purport to indemnify and defend Bi-Lo for its own negligence.

When "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact," the moving party is entitled to summary judgment. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005) (citing *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *see also* Rule 56, SCRCP. If the moving party meets its initial burden

[1] The October 14 Order held the following: (1) Unifirst owed no duty to Plaintiff; (2) there was no evidence of a defective condition that was either created by the mat or by Unifirst or that Unifirst was on notice of a defective condition; (3) the testimony revealed there were no witnesses to the alleged incident who could speak to the cause of the fall or even that noticed anything suspicious about the mat before the fall; and (4) there was no evidence that there was anything unusual about the mat before the incident and no evidence the mat was in a defective condition, unreasonably dangerous to the user.

of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings; rather, the opponent must present specific facts which infer there is a genuine issue for trial. *Rife*, 363 S.C. at 214, 609 S.E.2d at 568. Moreover, if the plaintiff fails to establish a genuine issue of fact as to one essential element necessary to the cause of action, the existence of factual issues relating to other elements becomes immaterial and therefore subject to summary judgment. *Baughman v. American Telephone and Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537, 545-46 (1991); *see also Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970 (4th Cir. 1990) (finding a party "will not be permitted to manufacture a genuine issue of material fact to survive a motion for summary judgment").

There is no issue of material fact that Unifirst cannot be jointly and severally liable with Bi-Lo in this case; therefore, Bi-Lo cannot sustain its claim for contribution. "The basic premise of contribution is commonality." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999) (holding there was no common liability among the defendants and contribution could not be found when the claims against one of the defendants had been dismissed). The right of contribution exists when two or more persons are jointly and severally liable in tort for the same personal injury, among other things. S.C. Code Ann. § 15-38-20 (B). Contribution may *only* exist for the tortfeasor who pays more than his pro rata share of the common liability, and recovery is limited to the excess amount paid by that tortfeasor. *Id.* Moreover, a court's judgment in "determining the liability of the several defendants to the claimant for an injury or wrongful death [is] binding as among such defendants in determining their right to contribution." S.C. Code Ann. 15-38-40 (F).

Like *Vermeer Carolina's, Inc.*, there is no common liability in this case. Plaintiff's causes of action against Unifirst were dismissed as a matter of law in the October 14 Order. Therefore,

Unifirst and Bi-Lo cannot be found to be joint tortfeasors. Moreover, if judged liable for negligence, Bi-Lo could not pay *more* than its pro rata share of the liability because, as the only tortfeasor, it would be responsible for all liability found. Accordingly, Bi-Lo cannot sustain a cause of action for contribution against Unifirst as a matter of law.

Further, Unifirst's motion for summary judgment is also granted as to Bi-Lo's cross-claims for equitable and contractual indemnity. The purpose of indemnity is to shift the entire loss from one party to another. *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1063 (D.S.C. 1993). Indemnity may be based in contract or by operation of law in equity and is a type of "compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Vermeer Carolina's. Inc.*, 336 S.C.at 60, 518 S.E.2d at 305; *see also Emerson Elec. Co.*, 843 F. Supp. at 1063.

As to its equitable indemnity cross-claim, Bi-Lo cannot meet all of the essential elements of equitable indemnity. To prove equitable indemnity, a claimant must show (1) the indemnitor is found liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from liability; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it. *Vermeer Carolina's. Inc.*, 336 S.C. at 63, 518 S.E.2d at 307. Plaintiff's causes of action against Unifirst were dismissed as a matter of law by the Court when it granted Unifirst's motion for summary judgment. Without any surviving claims against Unifirst, Plaintiff's alleged injuries cannot be attributed to any fault of Unifirst. Consequently, Unifirst cannot be found liable for causing Plaintiff's damages. Since liability may not be found on the part of Unifirst, Bi-Lo fails to meet the first element of equitable indemnity, liability on the part of the indemnitor. Since there is no genuine issue of fact as to that essential element, whether there are factual issues relating to other

elements is immaterial. *Baughman*, 306 S.C. 101, 410 S.E.2d at 545-46. Accordingly, Bi-Lo's cross-claim for equitable indemnity is dismissed as a matter of law.

Finally, as to Bi-Lo's cross-claim for contractual indemnity, Unifirst cannot be found liable for indemnification to Bi-Lo under the agreement between the parties because the agreement creates an exception for indemnity of Bi-Lo's own negligence.[2] "A contract of indemnity [is] construed in accordance with the rules for the construction of contracts generally." *Fed. Pacific Elec. v. Carolina Production Enterprises*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) (construing the agreement that the indemnitor/lessee would "indemnify [the indemnitee/landlord]... against any damage suffered or liability incurred ... or any loss or damage of any kind in connection with the Leased Premises during the term of [the] lease" against the indemnitee/landlord since it did not "disclose an intention to indemnify for consequences arising from [the indemnitee/landlord's] own negligence"). Even without such an exception, courts strictly construe "a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence," such that contracts will be construed to indemnify the indemnitee for its own negligent *only if* that "intention is expressed in clear and unequivocal terms." *Id.* (citing *Univ. Plaza Shopping Ctr., Inc. v. Stewart*, 272 So.2d 507 (Fla.1973); *Cox v. E.I. Du Pont de Nemours and Co.*, 39 F.R.D. 47 (W.D.S.C.1965); *Murray v. The Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 232 (1934) ("[A] provision [in] a contract relieving one of the parties thereto from liability for ... its own negligence should be *clear and explicit*.")).

Since there is no act upon which Unifirst can be liable to Bi-Lo for contractual indemnity as Plaintiff's claims against Unifirst have been dismissed, the only party that can be found negligent in

[2] The agreement between Unifirst and Bi-Lo was provided as an exhibit in the parties' respective supporting and opposing memoranda to this Motion. In Paragraph 9 of the applicable agreement between Unifirst and Bi-Lo, there is the following exception: "Company [Unifirst] shall indemnify and defend Customer [Bi-Lo] against any liability arising out of any act of Company [Unifirst], its employees or agents in connection with this Agreement, *except to the extent caused by the negligence of Customer* [Bi-Lo]." (Emphasis added).

this matter is Bi-Lo. Even without the specific exception in the agreement, there is no "clear and unequivocal" intention to provide indemnification to Bi-Lo for its own negligence; therefore, the agreement is strictly construed *against* indemnification. *Fed. Pacific Elec.*, 298 S.C. at 26-27, 378 S.E.2d at 57-58. Accordingly, Bi-Lo's cross-claim for contractual indemnity cannot be sustained and is dismissed as a matter of law.

For all of the foregoing reasons, the Court hereby orders Unifirst's Motion for Summary Judgment is **GRANTED**, and Bi-Lo's cross-claims for contribution, equitable indemnity, and contractual indemnity against Unifirst are **DISMISSED, with prejudice**;

This, the 17th day of JAN, 2014.

The Honorable R. Knox McMahon
Presiding Judge, 6th Judicial Circuit