Walt Disney World Co. v. Montgomery Kone

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

In this express indemnity action, cross-complainant Walt Disney World Co. (Disney) appeals a judgment in favor of cross-defendant Montgomery Kone, Inc. (Montgomery). Disney contends the court erred by determining Montgomery's fault was a prerequisite of its indemnity obligation, and the settlements in the underlying action do not raise a presumption of Montgomery's fault; disallowing the deposition testimony of an expert witness first offered during the rebuttal phase of trial; excluding parol evidence to interpret contract terms and not addressing all controverted issues in the statement of decision. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Under a 1992 Service Agreement with Disney, Montgomery maintained the escalators at the Disneyland Hotel. The agreement required Montgomery to indemnify Disney from any claims "arising directly or indirectly from . . . any breach of [Montgomery's] representations and warranties, any breach of [the] Agreement by [Montgomery] or any negligent act or omission of [Montgomery]. . . ."

In April 1997 Devin Ono (Devin), then 17 months old, darted onto an escalator at the hotel. He fell down and one of his fingers was caught between steps of the escalator and severed. Devin sued Disney and Montgomery for negligence, and Disney cross-complained against Montgomery for express indemnity and declaratory relief. [1] Disney and Montgomery separately settled Devin's claims shortly before trial.

A bench trial was held on Disney's cross-complaint. After the close of Disney's case-in-chief, Montgomery moved for judgment on the ground that Disney presented no evidence showing the cause of Devin's injury or that his claim arose directly or indirectly from any negligence or other fault of Montgomery. Disney argued that under Continental Heller Corp. v. Amtech Mechanical Services, Inc. (1997) 53 Cal.App.4th 500, Montgomery's fault was not a prerequisite to its indemnity obligation. The court took the motion under submission and required Montgomery to proceed with its defense case.

Montgomery's expert witness was its employee Patrick Welsh, an escalator mechanic. Welsh testified that about eight months before Devin's accident the state inspected and certified the escalator as being in compliance with applicable standards. Based on a review of documents and the deposition testimony of the mechanics who serviced the escalator, Welsh believed that Montgomery had properly maintained the escalator and there was no "improper meshing" of the escalator step treads or vertical risers. Welsh conceded he was unaware of whether the mechanics measured the gaps between stair treads and vertical risers to determine if they exceeded the allowable width of one-quarter inch.

In rebuttal, Disney sought to introduce deposition testimony of Carl White, the expert witness Devin designated in his action. Montgomery objected on the grounds that Disney should have submitted any expert evidence in its case-in-chief instead of on rebuttal, Disney had joined in Montgomery's motion in limine in the underlying action to exclude White's testimony on the ground he was not qualified as an escalator expert and Disney made no showing it tried to obtain the voluntary appearance of White, who lives out of state, at trial. The court took the objection under submission and advised the parties that for purposes of their closing arguments they should assume it would "read the entirety of . . . White's testimony."

During closing arguments, the court asked Disney whether its indemnity claim was based on any breach of representation or warranty, breach of contract or negligence of Montgomery, as required by the indemnity clause. Disney argued that notwithstanding the language of the indemnity clause, the Service Agreement implicitly allocated the risk of any claim associated with the escalator to Montgomery and in return it had "the privilege of getting to do the work and make a lot of money . . . ." Disney also argued the settlements in the underlying action presumptively established a basis for indemnity, although there was no "finding of fault in the underlying case . . . ."

On November 8, 1999, the court entered judgment for Montgomery. In a statement of decision the court explained: "At trial, [Disney] did not prove that Devin['s] injury and claim arose directly or indirectly from any of the possibilities specified in the Service Agreement, viz, either (1) Montgomery's breach of any representation or warranty it had made to the hotel, (2) Montgomery's breach of the Service Agreement, or (3) Montgomery's negligent acts or omissions. Indeed, to the extent that there was any evidence at all, it was insufficient to meet the burden of proof (and this includes the deposition testimony of . . . White . . .). [Fn.omitted.]" The court stated that Montgomery's objection to White's deposition testimony "should be sustained," but in any event the testimony "was insufficient to meet [Disney's] burden of proof on negligence by Montgomery."

DISCUSSION

I. Fault-based Indemnity

The obligation of indemnity is characterized as "'the obligation resting on one party to make good a

loss or damage another party has incurred.' [Citations.] [¶] An express indemnity obligation is contractual in nature, 'permitting great freedom of action to the parties in the establishment of the indemnity arrangements while at the same time subjecting the resulting contractual language to established rules of construction.' [Citation.]" (Heppler v. J. M. Peters Co. (1999) 73 Cal.App.4th 1265, 1276.) "The parties may establish a duty in the indemnitor to save the indemnitee harmless from the results of his or her active negligence -- provided the language is sufficiently specific and clear to evidence this intent. [Citation.] Likewise, the parties may require negligence by the indemnitor as a condition to indemnification [citation], or they may establish a duty in the indemnitor to save the indemnitee harmless even if the indemnitor is not negligent. [Citation.]" (Id. at p. 1277, italics added.) The interpretation of an express indemnity provision presents a question of law we review independently. (Ben-Zvi v. Edmar Co. (1995) 40 Cal.App.4th 468, 472.)

Disney's reliance on Continental Heller v. Amtech Mechanical Services, Inc., supra, 53 Cal.App.4th 500, for the proposition that Montgomery must indemnify it regardless of fault is misplaced. In Continental Heller, the indemnity clause required the indemnitor to indemnify the indemnitee "for a loss which 'arises out of or is in any way connected with the performance of work under this Subcontract.'" (Id. at p. 505.) The indemnity clause also provided that the indemnitor's "liability for indemnity 'shall apply to any acts or omissions, willful misconduct or negligent conduct, whether active or passive, on the part of Subcontractor.'" (Ibid.) Because the underlying action arose from "'an act' carried out in 'the performance of work under [the] Subcontract,'" the indemnitor's fault was not a prerequisite to recovery. (Ibid.)

In contrast, the Service Agreement required Montgomery to indemnify Disney only from claims "arising directly or indirectly from . . . any breach of [Montgomery's] representations and warranties, any breach of [the] Agreement by [Montgomery] or any negligent act or omission of [Montgomery]. . . ." To prevail, Disney was required to establish the underlying action arose from one of the specified types of fault.

II. No Showing of Fault

A.

Disney asserts the settlements in the underlying action entitled it to a presumption of Montgomery's negligence. Disney misunderstands the applicable law. Disney relies on Peter Culley & Associates v. Superior Court (1992) 10 Cal.App.4th 1484, in which the court held a good faith settlement is "presumptive evidence [in a later indemnity action] of liability of the indemnitee and of the amount of liability . . . ." (Id. at p. 1497, italics added.) The terms of a settlement are relevant because "[a] key element of any action for indemnification is a showing of damage incurred by the indemnitee." (Gouvis Engineering v. Superior Court (1995) 37 Cal.App.4th 642, 650.)

The settlement of the underlying claim does not establish the fault of the indemnitor or its duty to

indemnify under the contract. "[I]n a contractual indemnity action, the indemnitee must prove that liability is covered by the contract, that liability existed, and the extent thereof. A settlement in prior litigation is only presumptive evidence of liability and the amount thereof, which evidence may be overcome by the indemnitor's proof that the settlement was unreasonable." (Peter Culley & Associates v. Superior Court, supra, 10 Cal.App.4th at p. 1498, italics added; Collins Development Co. v. D. J. Plastering, Inc. (2000) 81 Cal.App.4th 771, 776-777; Gouvis Engineering v. Superior Court, supra, 37 Cal.App.4th 642, 650-651.)

B.

Alternatively, Disney contends that White's deposition testimony established Montgomery's negligence and the court improperly excluded the evidence. At trial, a party may call a designated expert witness of another party if he or she has been deposed. (Code Civ. Proc., § 2034, subd. (m).) We agree that Disney's joinder in Montgomery's motion to exclude the evidence in the underlying action did not necessarily preclude it from taking an inconsistent position at trial on the indemnity action. Further, White was beyond the court's subpoena power and the lack of evidence Disney sought his voluntary presence at trial is not dispositive. However, White's deposition testimony was improper rebuttal evidence. [2]

An element of Disney's indemnity cause of action is that the underlying claim arose directly or indirectly from the fault of Montgomery. It is well settled that a plaintiff may not reserve a portion of his or her evidence until after the defendant has presented its defense. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 70, pp. 101-102; Lipman v. Ashburn (1951) 106 Cal.App.2d 616, 620; Bates v. Newman (1953) 121 Cal.App.2d 800, 806.) "A motion to reopen a case for further evidence can be granted only on a showing of good cause. [Citation.] Reopening is not a matter of a right but rests upon the sound discretion of the trial court. That discretion should not be overturned on appeal absent a clear showing of abuse. [Citations.]" (Sanchez v. Bay General Hospital (1981) 116 Cal.App.3d 776, 793; Code Civ. Proc., § 607, subd. 6.) We find no abuse of discretion. The record shows Disney made a tactical decision to not submit White's deposition testimony during its case-in-chief, even though it anticipated the court may not accept its argument that the settlements in the underlying action presumptively established Montgomery's fault and indemnity obligation.

In any event, Disney cannot show prejudice. Despite sustaining Montgomery's objection to White's deposition testimony, the court considered it and found it insufficient to show Montgomery's fault. White testified that an escalator should be maintained to prevent the gap between stair treads and vertical risers from exceeding one-quarter inch. White conceded he had no measurement of the gap in which Devin's finger was caught. He merely surmised the gap was greater than one-quarter inch, because it appeared from an x-ray of Devin's hand that his severed finger would have exceeded that size. White, however, cautioned he was "not purporting to establish any kind of dimension" and reading x-rays was outside his area of expertise.

White also testified that in 1992 and 1996 reports, a consultant of Disney recommended the replacement of the "step chain" on the escalator. White explained that a step chain may elongate over time and cause enlargement of the gaps between stair treads and vertical risers. However, White's opinion that Montgomery had not replaced the step chain was speculation. Further, White conceded he had no background in engineering or escalator maintenance.

It is not our province to weigh the evidence or assess the credibility of the witnesses. (In re Marriage of Smith (1990) 225 Cal.App.3d 469, 493-494.) Rather, when the evidence is in conflict "the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence . . . that will support the trial court's determination. [Citation.]" (San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal.App.4th 517, 528.) Substantial evidence supports the court's finding that even considering White's deposition testimony, Disney did not establish the underlying action arose directly or indirectly from any fault of Montgomery. [3]

C.

Additionally, Disney contends the indemnity obligation is triggered because Montgomery breached the Service Agreement by failing to "purchase appropriate insurance" for Disney. Disney neither pleaded this theory of indemnification in its cross-complaint nor argued it at the trial court. [4] Issues not presented to the trial court are waived on appeal (Royster v. Montanez (1982) 134 Cal.App.3d 362, 367); a party may not ordinarily change the theory of his or her case for the first time on appeal. (Panopulos v. Maderis (1956) 47 Cal.2d 337, 340.)

Even without waiver, Disney's contention lacks merit. Montgomery was required to indemnify Disney from claims arising from its fault; Devin's claim did not arise from any breach of Montgomery to procure insurance for Disney. In any event, the evidence shows that Montgomery met its insurance obligation under the Service Agreement. [5] Under paragraph 6, subdivision (b) of the agreement Montgomery was allowed to provide Disney with "an Owners and Contractors Protective Liability [OCP] Policy" in lieu of having it named as an additional insured on Montgomery's comprehensive general liability [CGL] policy. A claims adjuster employed by Disney testified that Montgomery did procure an OCP policy for it and such policies provide narrower coverage than CGL policies. Contrary to Disney's assertion, the insurer's denial of the underlying claim based on a policy exclusion for "work completed or put to intended use," does not establish Montgomery's breach of contract.

We also reject Disney's assertion the court erred by disallowing parol evidence to demonstrate that Montgomery was required to secure CGL coverage to protect Disney from any claim related to the escalator. "When the parties dispute the meaning of a contract term, the trial court's first step is to determine whether the term is ambiguous, i.e., it is 'reasonably susceptible' to either of the meanings urged by the parties. [Citation.] In making [its] determination, the court is not limited to the contract

language itself but provisionally receives, without actually admitting, any extrinsic evidence offered by a party which is relevant to show the contract could or could not have a particular meaning. [Citation.] If, in light of the language of the contract and extrinsic evidence as to its meaning, the trial court determines the language is 'reasonably susceptible' to either of the meanings urged by the parties the court moves on to the second step which is to determine just what the parties intended the contract term to mean." (Curry v. Moody (1995) 40 Cal.App.4th 1547, 1552; Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co. (1968) 69 Cal.2d 33, 39-40.) The trial court's ruling on the threshold issue of ambiguity is a question of law subject to our independent review. (Curry v. Moody, supra, 40 Cal.App.4th at p. 1552.)

Disney's parol evidence does not prove a meaning to which the Service Agreement is reasonably susceptible. The parties deleted the words "and Owner" from subdivision (a) of paragraph 6 and thus Montgomery was not required to cover Disney under a CGL policy. Subdivision (b) of paragraph 6 does not suggest the parties nonetheless intended that Montgomery was required to provide Disney with CGL coverage. Rather, the provision allowed Montgomery to purchase an OCP policy for Disney in lieu of a CGL policy. Further, although the court did not provisionally receive the parol evidence, Disney was not prejudiced because it apprised the court as to what the evidence would show. [6]

III. Waiver of any Insufficiency in Statement of Decision

Lastly, Disney contends the judgment must be reversed because the trial court did not "issue a statement of decision which explained the factual and legal basis for each of the principal controverted issues at trial." (See Code Civ. Proc., § 632.) On September 20, 1999, the court issued a notice of intended ruling. On September 30, Disney requested a statement of decision regarding numerous issues. On November 8, the court entered judgment for Montgomery and issued a statement of decision. The record contains no indication that Disney objected to the statement of decision. "[I]f a party does not bring . . . deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient. . . ." (In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133-1134.)

DISPOSITION

The judgment is affirmed. Montgomery is awarded costs on appeal.

WE CONCUR:

KREMER, P. J.

McDONALD, J.

1. The cross- complaint also included causes of action for "total indemnity" and "comparative indemnity," but Disney dismissed them during trial.

2. In its statement of decision, the court did not expressly include improper rebuttal evidence as a ground for excluding White's deposition testimony. However, "we review the trial court's order, not its reasoning, and affirm an order if it is correct on any theory apparent from the record." (Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal.App.3d 706, 712.)

3. Disney incorrectly asserts that "White's [deposition] testimony that Montgomery's maintenance of the escalator fell below the standard of care was never contradicted[.]" Montgomery's expert witness, Welsh, testified it properly maintained the escalators as required under the Service Agreement.

4. Disney argued at trial that Montgomery did not procure adequate insurance for it, but it did not equate the omission with a breach of contract giving rise to an indemnity claim.

5. The insurance provisions of the Service Agreement state in part: "[6]a. Contractor shall, throughout the performance of its Services pursuant to this Agreement secure and maintain: [¶] (i) [CGL] [i]nsurance . . ., with minimum limits of two million dollars . . . combined single limit per occurrence, protecting it and Owner from claims for personal injury . . . which may arise from or in connection with the performance of Contractor's Services hereunder or out of any negligent act or omission of Contractor . . . . "[6]b. All such insurance required in paragraph (a) shall . . . name Owner . . . as additional insureds (in lieu of Owner being named additional insured, Contractor shall purchase on behalf of Owner an [OCP] [p]olicy with minimum limits of [t]wo [m]illion [d]ollars . . . ." (Italics added.) The words "and Owner" in paragraph 6 (a) were crossed out and initialed by Disney and Montgomery.

6. The Service Agreement states its terms "shall constitute the sole understanding of the parties . . . notwithstanding any prior oral or written statements, instructions, agreements, representations or other communications." Generally, however, parol evidence is admissible "to interpret the language of an integrated written instrument where such evidence is relevant to prove a meaning to which the contractual language is 'reasonably susceptible.' [Citation.]" (Morey v. Vannucci (1998) 64 Cal.App.4th 904, 912- 913, fn. 4.)