STATE OF MICHIGAN

COURT OF APPEALS

CAROL L WENDZEL,

Plaintiff,

v

SUSAN L FELDSTEIN,

Defendant/Cross-Defendant-Appellant.

and

WHETHERSFIELD APARTMENTS, L.L.C.,

Defendant/Cross-Plaintiff-Appellee

UNPUBLISHED
November 17, 2015

No. 324216
Oakland Circuit Court
LC No. 2013-131985-NI

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

Susan Feldstein's dog bit Carol Wendzel in a common area of the Whethersfield Apartments complex, where all three resided. Wendzel sued Feldstein and Whethersfield, asserting a variety of negligence claims. Whethersfield then filed a cross-claim against Feldstein, invoking an indemnification provision in Feldstein's lease. Whethersfield eventually settled with Wendzel and sought summary disposition of the cross-claim. Feldstein raised a number of challenges to the indemnification provision, but the circuit court rejected them and entered judgment in favor of Whethersfield. We affirm.

I.

In November 2011, Feldstein leased an apartment from Whethersfield Apartments, L.C.C., in Bloomfield Hills. The lease prohibited dogs "in the Apartment or common areas." Shortly after moving in, Feldstein adopted an eight or nine-year-old German Shepherd and named her Dreidel. Feldstein had "fostered" Dreidel before adopting her. Dreidel's previous owner kept the dog in the basement most of the time, which evidently impaired Dreidel's social skills.

During the first seven months of Feldstein's tenancy, Dreidel bit three people in Whethersfield's common areas. Dreidel's first victim was a drunken neighbor who ignored

Feldstein's order to stay back while she walked the dog on a leash. No one reported this incident to Whethersfield's management.

Shortly thereafter, Whethersfield's manager, DeAnna Bruzos, learned from another apartment employee that Feldstein owned a dog. Bruzos hand-delivered to Feldstein Whethersfield's standard "dog pet addendum," which permitted Feldstein to keep one dog conditioned on execution of the agreement and payment of a refundable $200 pet deposit.[1] Feldstein eventually signed the addendum and concedes that it applied retroactively to the date the lease commenced.

This case centers on paragraph 6 of the pet addendum, which states:

> Resident agrees to indemnify and hold Landlord harmless from any and all claims arising out of the presence of said pet. Resident also affirms that renters insurance will be in force for the duration of the lease.

Feldstein admitted that she never obtained renters' insurance.

On May 29, 2012, Dreidel struck again, biting the ankle of young Peter Lee as he rode his bicycle near the edge of Feldstein's back patio, in an area called the courtyard. Dreidel had been secured to a 12-foot steel cable attached to a stake just outside Feldstein's door. Unfortunately, Dreidel's collar broke when she ran toward Peter. Peter's parent advised Bruzos of this episode. Feldstein subsequently told Bruzos that Dreidel had an appointment with a "behaviorist to discuss muzzle options for the dog." Feldstein and Bruzos agreed that when Dreidel was in a common area, she would be leashed and muzzled. Bruzos later signed an affidavit averring, "The May 29, 2012 dog bite incident was the first time Whethersfield Apartments had any knowledge that Dreidel may have potential dangerous propensities. . . ."

Dreidel inflicted a third and final bite in July 2012. Feldstein's neighbor, Carol Wendzel, testified that she was walking on a path through the middle of the courtyard when Dreidel came out from behind Feldstein's patio's privacy wall "and literally flew through the air and got ahold of me." According to Wendzel, Dreidel was not on a leash and Feldstein was nowhere in sight. Dreidel bit Wendzel's leg and knocked Wendzel to the ground. A few days later, Wendzel discovered that she had fractured an ankle.

Feldstein claimed that Dreidel was on the patio, restrained by a 12-foot tether with a reinforced collar, when the phone rang and Feldstein entered her apartment to answer it. Feldstein did not see Dreidel bite Wendzel, but opined that Wendzel must have left the sidewalk and "come onto the grass" near Feldstein's patio. In any event, animal control seized Dreidel. After a 10-day quarantine period expired, Feldstein decided that Dreidel would be euthanized due to the dog's health problems.

[1] Bruzos rescinded the deposit requirement based on Feldstein's representation that Dreidel would reside at Whethersfield only temporarily.

In January 2013, Wendzel filed suit against Feldstein and Whethersfield in the Oakland Circuit Court, asserting claims for strict liability and common law negligence against Feldstein, and negligence against Whethersfield. The complaint alleged that Whethersfield breached its duties to Wendzel in a variety of ways, including by failing to exercise due care to keep the premises reasonably safe for tenants and by "failing to correct an obvious and dangerous condition on the premises, to wit: a dog which would attack without provocation, in obvious disregard for the health, safety and well-being of the persons lawfully upon the premises[.]" Whethersfield in turn filed a cross-complaint against Feldstein seeking indemnification under the pet addendum.

Whethersfield sought summary disposition of Wendzel's claims against it. Before the motion could be decided, however, the parties participated in case evaluation. The evaluators rendered an award in favor of Wendzel for $80,000, apportioning $50,000 against Feldstein and $30,000 against Whethersfield. Only after case evaluation did the circuit court deny Whethersfield's summary disposition motion, discerning remaining questions of material fact. Wendzel and Whethersfield then accepted the case evaluation award, and Whethersfield tendered a $30,000 check in settlement of Wendzel's claims. Feldstein rejected the case evaluation award, however.

Following the Whethersfield-Wendzel settlement, the circuit court granted Whethersfield's motion for summary disposition against Feldstein. In a written opinion and order the court reasoned that the language of paragraph six of the pet addendum was "clear and unambiguous and Plaintiff's complaint arises out of the presence of Feldstein's pet." The court denied reconsideration and entered judgment against Feldstein for $30,000 "based upon the case evaluation settlement with Wendzel and in conjunction with the indemnification owed by Feldstein." Wendzel voluntarily dismissed her claims against Feldstein. Feldstein now appeals.

II.

Feldstein first contends that the indemnification clause in paragraph 6 of the pet addendum violates public policy because it conflicts with MCL 554.633(1)(e), a provision of Michigan's Truth in Renting Act, MCL 554.631 *et seq*. Section 554.633(1)(e) provides in relevant part:

> A rental agreement shall not include a provision that does 1 or more of the following:
>
> * * *
>
> (e) Exculpates the lessor from liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law. . . .

Feldstein argues that the indemnification requirement illegally exculpated Whethersfield from liability for Whethersfield's breach of its nondelegable duty to maintain the common areas "fit for the use intended by the parties," thereby free from Dreidel's attacks. As Feldstein did not make this argument in the circuit court, we review it to determine whether plain error occurred that affected Feldstein's substantial rights. *In re Gerald L Pollack Trust*, 309 Mich App 125, 154; 867 NW2d 884 (2015).

We construe indemnity clauses in the same fashion as other contractual provisions. *Zahn v Kroger Co*, 483 Mich 34, 40; 764 NW2d 207 (2009). Thus, we interpret the language of an indemnity provision to give effect to the parties' intentions. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). "We determine the parties' intent by examining the language of the contract according to its plain and ordinary meaning." *Id*. The language of the indemnification agreement is plain, unambiguous, and broad in scope. It requires Feldstein to indemnify Whethersfield from "any and all claims arising out of the presence of" Dreidel in the apartment complex. Feldstein does not dispute the meaning of this provision.

Landlords have "a duty of care to keep the premises within their control reasonably safe from physical hazard," and to generally keep common areas "reasonably safe." *Bailey v Schaaf*, 494 Mich 595, 605; 835 NW2d 413 (2013). According to Feldstein, this includes protecting tenants "from foreseeable activities in the common areas where for example the presence of a 'vicious' dog might be found." By transferring this duty to Feldstein through the indemnification clause in the pet addendum, Feldstein contends, Whethersfield "effectively exculpated itself from liability arising from violation of the duty imposed by law." We find no plain error, as the indemnification agreement did not "exculpate" Whethersfield.

Exculpatory clauses in residential leases that negate a landlord's statutory duties are unenforceable because they violate public policy. In *Calef v West*, 252 Mich App 443, 445-446; 652 NW2d 496 (2002), the plaintiff-tenant "stepped into a snow-covered hole located in the front yard of the leased premises" and suffered several fractures. His complaint asserted that the defendant created the hole by removing a fence post and negligently failing to repair the lawn. In a motion to amend the complaint, the plaintiff sought to add that the defendant failed to warn him of the dangerous latent condition. *Id*. at 446. The defendant successfully moved for summary disposition based on an exculpatory provision of the lease, which provided in relevant part:

> *Landlord, Owners of the property, or their agents, shall not be liable for any damage or injury to the Tenant, or to any other person, or for any property, occurring on the premises, or any part thereof, or any common areas, thereof.* Tenant agrees to hold Landlord, Owner and their agents harmless from any and al [sic] claims for damages. Tenant is encouraged to obtain and keep in force, during the term of this agreement, sufficient insurance coverage, to protect the tenant, and all other parties, from the above. [*Id*. (emphasis in original).]

This Court reversed, holding that "exculpatory clauses in residential leasehold agreements are void, as against public policy, to the extent that they purport to immunize the landlord from tort liability for the breach of a statutory duty." *Id*. at 452. We pointed out that under the common law a landlord bears a duty to warn a tenant of concealed or latent defects on the premises. *Id*. at 451. The landlord was not permitted to abrogate that duty in its lease through an exculpatory clause, as doing so violated MCL 554.633(1)(e). *Id.* at 454-455.

We are unpersuaded that the indemnification provision in Feldstein's lease amounts to an illegal exculpation clause. First, nothing in paragraph 6 (or the balance of the lease) absolves Whethersfield of its own liability for breaches of its standard of care. Assuming that Whethersfield bore a statutory duty to keep the common areas safe from "vicious dogs," the

indemnification agreement simply did not delegate that duty to Feldstein. In *Calef*, this Court struck down an exculpatory provision because it had the effect of "immuniz[ing] the landlord from tort liability for the breach of a statutory duty." *Calef*, 252 Mich App at 452. Here, nothing in the lease or the addendum released Whethersfield from the obligation to keep the premises safe from physical or other hazards. As stated by the Supreme Court of Colorado in a somewhat analogous case,

> An agreement to indemnify against liability for the breach of a duty is clearly not the equivalent of delegating that duty to another. An agreement to indemnify in no way purports to relieve the indemnitee of a duty owed to someone else, whether that duty is considered delegable or not. As in this case, an indemnitee remains liable to another for injury resulting from its breach of a duty owed to the injured party, and its indemnitor merely agrees to hold the indemnitee harmless from such loss or damage as may be specified in their contract. Significantly, an agreement to indemnify, by definition, does not (and could not, without becoming something more than an agreement to indemnify) purport to substitute an indemnitor for an indemnitee, or in any way diminish the indemnitees obligation to a party it has injured, whether the indemnitor ultimately fulfills its agreement or not. [*Constable v Northglenn, LLC*, 248 P3d 714, 718 (Colo, 2011).]

Rather than immunizing Whethersfield from its statutory duties, paragraph six identified the tenant as the party bearing ultimate financial responsibility when a tenant's dog causes injuries or damage on the premises. As articulated in *Constable*, "It is often the case that such an allocation of the risk of injury, without regard to fault, serves as a constituent component of the consideration demanded for entering into a lease agreement." *Id*. Unlike the provision at issue in *Calef*, the language of paragraph 6 merely allocates financial responsibility for loss incurred by the landlord that was occasioned by an act or omission of the tenant.

Nor do we find objectionable the fact that the provision serves in part to reimburse Whethersfield for its own failure to take more aggressive actions against Feldstein and Dreidel after the Peter Lee incident. This Court has held that an indemnification agreement may be upheld despite that it indemnifies an indemnitee for its own negligence:

> Michigan courts have discarded the additional rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence unless such an intent is expressed clearly and unequivocally in the contract. Instead, broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from "other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." [*Sherman v*

DeMaria Bldg Co, Inc, 203 Mich App 593, 596-597; 513 NW2d 187 (1994) (citations omitted).][2]

Moreover, our courts have repeatedly emphasized that "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002) (quotation marks and citation omitted). Thus, the clear and unequivocal language of the agreement does not collide with any public policy considerations.

III.

We next consider Feldstein's remaining and closely interrelated arguments that unfulfilled procedural prerequisites render Whethersfield's cross-claim fatally defective. We again perceive no impediment to the cross-claim's enforcement.

Feldstein first asserts that absent proof or a judicial determination of Whethersfield's liability and a tender of its defense, indemnification would be improper. However, the broad language of the indemnification agreement required neither proof of Whethersfield's liability nor a tender of its defense.

"[A]n indemnification provision is to be construed to effectuate the intentions of the parties to the contract, which is determined through review of the contract language, the situation of the parties, and the circumstances involved in the initiation of the contract." *Ajax Paving Indus, Inc v Vanopdenbosch Constr Co*, 289 Mich App 639, 644; 797 NW2d 704 (2010). Here, the indemnification provision required Feldstein to indemnify Whethersfield "from any and all claims arising out of the presence of [Dreidel]." It is hard to imagine broader language. The words plainly indicate that a claim "arising from" the mere "presence" of Dreidel triggers indemnification. For example, if a child fell off his bicycle in fear after merely seeing the dog from a distance and sustained injury, Feldstein would be liable to reimburse Whethersfield for any damages paid. The term "presence" does not contemplate proof of fault, proximate cause, or evidence confirming blame of any sort. Rather, by signing the addendum, Feldstein agreed to be strictly liable to Whethersfield for any consequences of Dreidel's residence on the premises.

In *Ajax*, this Court rejected the notion that an indemnification agreement is unenforceable unless the indemnitee or the injured party proves liability on the part of the indemnitor. *Id*. at 645. Similarly, the Court held that unless an indemnification agreement expressly provides for the tender of a defense, none is necessary. *Id*. at 649-650. The Court distinguished an older

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[2] This rule is modified by MCL 691.991, which provides that indemnification clauses in construction contracts are void and unenforceable to the extent that they "purport[ ] to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the *sole negligence* of the promisee or indemnitee, his agents or employees." (Emphasis added.) Thus, as a matter of public policy the Legislature has barred indemnification clauses where a plaintiff's "bodily injury" results from the sole negligence of a contractor-indemnitee.

case, *Grand Trunk W R Co v Auto Warehousing Co*, 262 Mich App 345; 686 NW2d 756 (2004), as there the indemnification contract specifically provided a duty to defend. *Ajax*, 289 Mich App at 650. Indeed, *Grand Trunk* highlights that the parties' contract controls: "Where the parties have contracted to create duties that differ or extend beyond those established by general principles of law, and the terms of the contract are not otherwise unenforceable, the parties must abide by the contractual duties created." *Grand Trunk*, 262 Mich App at 351.

Feldstein cannot escape the plain language of the agreement she signed. Whethersfield's fault or the scope of its legal liability to Wendzel is irrelevant as the indemnification agreement clearly imposed a duty on Feldstein to reimburse Whethersfield for any claims arising from Dreidel's presence rather than Feldstein's (or Whethersfield's) negligence.

Feldstein lastly contends that the circuit court improperly used the case evaluation award against Whethersfield as the measure of Feldstein's indemnification responsibility, and that because an insurance company paid Wendzel, Whethersfield was not the real party in interest. As to the case evaluation award, Whethersfield presented a copy of the check written to Wendzel in support of its indemnification claim. This satisfied any evidentiary requirements. To the extent Feldstein suggests that the settlement was unreasonable, we disagree. The case evaluators valued Wendzel's total damages at $80,000. Given the panel's calculation of this risk of exposure, Whethersfield's settlement qualifies as eminently reasonable.

Nor do we detect any merit in Feldstein's real-party-in-interest argument. Throughout the litigation, Whethersfield was the real party in interest, and not its insurance company. Whethersfield accepted the case evaluation award, subjecting itself to the automatic entry of a judgment if Wendzel also accepted. Most importantly, paragraph 6 contractually bound Feldstein to reimburse Whethersfield.

We affirm.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher