2014 IL App (1st) 123648-U
No. 1-12-3648
June 11, 2014

Third Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| BNSF RAILWAY COMPANY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>PROBUILD NORTH LLC, FORMERLY KNOWN AS FEW ACQUISITION, LLC, AS ASSIGNEE OF F.E. WHEATON & COMPANY, INC., and LIBERTY MUTUAL FIRE INSURANCE COMPANY,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court Of Cook County.<br><br>No. 08 CH 8509<br><br>The Honorable Neil Cohen, Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

**ORDER**

¶ 1 *Held*: When an indemnification clause provides for splitting liability when both parties act negligently, the contract does not require one party to indemnify the second for the second party's negligence. The "mend the hold" doctrine, restricting changes in a party's reasons for certain conduct, does not apply to changes made before litigation begins.

¶ 2 An employee of BNSF Railway Company died in an accident that occurred when the employee was delivering rail cars to ProBuild North LLC. BNSF settled the claim brought by the estate of the deceased employee. A 1996 contract between BNSF and ProBuild required ProBuild to purchase insurance covering BNSF, and the contract required ProBuild to indemnify BNSF for some costs. When ProBuild and its insurer, Liberty Mutual Fire Insurance Company, refused to reimburse BNSF for its settlement with the employee's estate, BNSF sued ProBuild and Liberty for breach of contract. The circuit court entered judgment in favor of ProBuild and Liberty on pretrial motions for judgment on the pleadings and summary judgment, finding that the employee exclusion in Liberty's policy applied.

¶ 3 In this appeal, BNSF argues that the trial court erred because the contract requires ProBuild to indemnify BNSF for BNSF's own negligence, and Liberty's initial response to the request for coverage estops Liberty from arguing that the employee exclusion justified the denial of coverage for the accident.

¶ 4 We find that the contract does not unequivocally require ProBuild to indemnify BNSF for BNSF's own negligence, and therefore it does not require indemnification under the circumstances of this case. Where Liberty at two separate times, both before litigation began, gave reasons for denying coverage for the accident, we find that the assertion of the first ground did not estop Liberty from raising a second reason for denying coverage. Accordingly, we affirm the trial court's judgment.

¶ 5 BACKGROUND

¶ 6 In 1996, Burlington Northern Railroad Company agreed to construct track from its main track to a plant operated by F.E. Wheaton & Co., a subsidiary of ProBuild. In the written "Industry Track Agreement," which Burlington prepared, Wheaton agreed to "procure and

maintain throughout the term of this Agreement *** a comprehensive general form of insurance covering liability ***. RAILROAD SHALL BE NAMED AS AN ADDITIONAL INSURED PARTY COVERED BY THE POLICY." ProBuild and Wheaton further agreed they:

> "shall indemnify and save harmless [Burlington] from any and all claims, demands, suits, losses, judgments, costs, damages, or expenses on account of injuries to or death of any and all persons whomsoever, and any and all loss or destruction of or damage to property *** arising or growing out of or in any manner connected with the construction, maintenance, operation, and use of the Track and crossings covered by this Agreement, or caused or occasioned *** by reason of or arising during the presence of the person of [ProBuild], its subcontractors, the employees or agents of either, or third parties upon or in proximity to the Track ***. If any claim or liability shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally."

¶ 7 ProBuild purchased insurance from Liberty to cover the period from May 2007 to May 2008. The policy excluded coverage for " 'Bodily injury' to *** [a]n 'employee' of the insured arising out of and in the course of *** [e]mployment by the insured."

¶ 8 On December 28, 2007, Hubert Aull, an employee of Burlington Northern's successor, BNSF, died in an accident that occurred in the course of his work with other BNSF employees, helping deliver railcars to ProBuild and remove railcars from ProBuild via the track constructed under the 1996 track agreement. No ProBuild employee took part in the work.

¶ 9 BNSF notified ProBuild about the accident on January 7, 2008. BNSF said it would investigate, but suggested that ProBuild might conduct its own investigation to protect its interests. BNSF requested the certificate for ProBuild's insurance. Liberty responded that it set up a claim file and intended to investigate the incident to determine whether ProBuild and Liberty had any liability for the accident.

¶ 10 On June 2, 2008, BNSF notified Liberty and ProBuild that it intended to negotiate with Aull's estate. In the notification letter, BNSF acknowledged that Liberty had informed BNSF that it "[did] not believe the [track] agreement require[d] [ProBuild] to provide insurance to BNSF under the circumstances of the Aull accident." BNSF also acknowledged that Liberty had refused to provide BNSF with a copy of the insurance certificate for the insurance Liberty sold to ProBuild. BNSF asserted in the letter that the accident arose out of the use of the track, so the track agreement required ProBuild to indemnify BNSF for any settlement with Aull's estate.

¶ 11 On September 25, 2008, BNSF and Aull's estate agreed to a settlement of the claim. BNSF again requested a copy of the certificate for the policy Liberty issued to ProBuild. On October 9, 2008, Liberty wrote to BNSF:

> "[T]he 'Industry Track Agreement' between BNSF and FE Wheaton specifically requires FE Wheaton to procure and maintain comprehensive general liability insurance naming BNSF as an additional insured party.
>
> We reserve comment on whether or not BNSF in fact qualifies as an additional insured under the FE Wheaton policy at this time. However, even if BNSF does so qualify, please note the following exclusion which appears in the policy:

*** Employer's Liability

'Bodily injury' to:

(1) An 'employee' of the insured arising out of and in the course of:

(a) Employment by the insured[.]"

¶ 12 On November 11, 2008, BNSF gave the executor of Aull's will a check for $595,000 in exchange for her release and settlement of Aull's claim against BNSF. On November 26, 2008, BNSF filed a complaint against ProBuild and Liberty. In count I, BNSF sought to recover from ProBuild under the contractual promise to indemnify BNSF for any loss incurred in connection with work on the track added pursuant to the track agreement, although BNSF did not claim that ProBuild acted negligently or that the negligence of anyone other than BNSF and its employees caused Aull's death. BNSF claimed, in count II, that ProBuild breached the separate promise to purchase general liability insurance naming BNSF as an additional insured. The counts against Liberty underwent significant amendment. In the final amended complaint, BNSF claimed, in count III, that Liberty breached the insurance contract it sold to ProBuild, by refusing to pay BNSF for the Aull settlement. In count IV, BNSF argued that Liberty waived its policy defenses to coverage, including the employee exclusion, and in count V, BNSF asked the court to hold Liberty estopped from raising any policy defenses.

¶ 13 In the complaint, BNSF alleged that Liberty closed its file on the Aull claim without notice to BNSF. BNSF did not allege that Liberty told BNSF the grounds for closing the file, or that Liberty explained to BNSF why Liberty denied coverage, until Liberty sent the letter of October 9, 2008, denying coverage because of the employee exclusion.

¶ 14 Liberty moved for judgment on the pleadings. In an order dated January 3, 2011, the court struck the waiver count and the estoppel count. The court later granted Liberty judgment on the breach of contract claim, holding that the employee exclusion applied, and warranted Liberty's denial of coverage.

¶ 15 ProBuild moved for summary judgment on counts I and II. The court granted ProBuild judgment on the claim for breach of the contract to obtain insurance, finding that the employee exclusion meant that BNSF could not prove damages from the failure to have BNSF named as additional insured on the liability policy. The court then granted ProBuild judgment on the indemnification count on grounds that the track agreement did not require ProBuild to indemnify BNSF for the negligence of BNSF and its employees. The court entered judgment against BNSF on all counts. BNSF now appeals.

¶ 16 ANALYSIS

¶ 17 We review *de novo* the orders granting judgment on the pleadings (*State Building Venture v. O'Donnell*, 239 Ill. 2d 151, 157 (2010)), dismissal (*Bell v. Hutsell*, 2011 IL 110724, ¶ 9), or summary judgment (*A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22). BNSF has abandoned its claim against ProBuild for failing to purchase insurance naming BNSF as an additional insured, and its claim that Liberty waived its policy defenses. BNSF also concedes that the employee exclusion applies unless the court holds Liberty estopped from raising the issue of the employee exclusion. Thus, BNSF only challenges the rulings on count I, the claim against ProBuild for indemnity, count V, in which BNSF asked the court to find Liberty estopped from raising policy defenses, and count III, against Liberty for breach of the insurance policy, where the claim depends on the estoppel argument.

¶ 18 Indemnity

¶ 19 The court granted ProBuild's motion for summary judgment on the indemnity claim on grounds that the contract did not require ProBuild to indemnify BNSF for the negligence of BNSF and its employees. Both parties cite *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302 (2008) as guiding authority on the issue. In *Buenz*, the contract between Frontline and COSCO provided, "[Frontline] shall indemnify [COSCO] against, and hold [COSCO] harmless for any and all claims * * * arising out of, [in] connection with, or resulting from the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [COSCO]." *Buenz*, 227 Ill. 2d at 306. COSCO sought indemnity from Frontline for COSCO's negligence. The *Buenz* court applied the principle that " 'an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract [citations] or such intention is expressed in unequivocal terms.' " *Buenz*, 227 Ill. 2d at 309, *quoting Westinghouse Electric Elevator Co. v. La Salle Monroe Building Corp.*, 395 Ill. 429, 433 (1947). The *Buenz* court noted that " 'in the absence of an express agreement, it is against Illinois public policy to require indemnification for a person's own negligence.' " *Buenz*, 227 Ill. 2d at 319, quoting *Karsner v. Lechters Illinois, Inc.*, 331 Ill. App. 3d 474, 477 (2002).

¶ 20 The *Buenz* court held that Frontline explicitly promised to indemnify COSCO for "any and all claims" arising out of the use of the equipment at issue, and that promise sufficed to commit Frontline to indemnifying COSCO for COSCO's own negligence. The *Buenz* court especially emphasized that the contract between Frontline and COSCO "contain[ed] no

limiting language to suggest that the indemnity provided is not intended to cover claims resulting from COSCO's own negligence." *Buenz*, 227 Ill. 2d at 317-18.

¶ 21 The track agreement here includes the kind of limiting language not included in the *Buenz* contract. The indemnity clause in the track agreement specifically provides in its final sentence, that "[i]f any claim or liability shall arise from the joint or concurring negligence of the parties hereto, it shall be borne by them equally." Thus, the track agreement requires ProBuild to indemnify BNSF for losses other than the losses caused by the negligence of BNSF and BNSF's employees.

¶ 22 BNSF argues that the final sentence makes the indemnity clause ambiguous, and therefore the trial court should have heard evidence on the meaning of the clause. Construing the contract as a whole, as we must (*Buenz*, 227 Ill. 2d at 316), we find no ambiguity. The track agreement does not require ProBuild to indemnify BNSF for damages due to the negligence of BNSF and its employees. Moreover, the asserted ambiguity itself suffices to show that the track agreement does not have "clear and explicit language *** express[ing] in unequivocal terms" an intention to require ProBuild to indemnify BNSF for the negligence of BNSF and BNSF's employees. *Westinghouse*, 395 Ill. at 433. In the absence of such unequivocal terms, Illinois public policy directs us not to construe the track agreement as one that provides for ProBuild to indemnify BNSF for BNSF's negligence. See *Buenz*, 227 Ill. 2d at 319. Accordingly, we affirm the order granting summary judgment in favor of ProBuild.

¶ 23 Estoppel

¶ 24 BNSF argues that the court should find Liberty estopped from relying on the employee exclusion based on the "mend the hold" doctrine enunciated in *Ohio & Mississippi Ry. Co. v. McCarthy*, 96 U.S. 258, 268 (1877). Under that doctrine, "Where a party gives a reason for

his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration." *Ohio & Mississippi*, 96 U.S. at 267. BNSF asserts that Liberty initially denied coverage on grounds that the accident did not happen on the part of the track covered under the track agreement, and therefore it cannot rely on the employee exclusion as grounds for denying coverage.

¶ 25 BNSF did not include in its complaint any allegation that Liberty told BNSF that it denied coverage due to the location of the accident. BNSF attached to the complaint a copy of a letter it sent to Liberty, in which BNSF said Liberty had asserted that the track agreement did not require ProBuild to provide insurance for BNSF "under the circumstances of the Aull accident." In its letter, BNSF responded that because the incident arose out of use of the track, the track agreement "govern[ed] the Aull incident." No other evidence or allegation in the pleadings supports the assertion that Liberty informed BNSF of any grounds for denying coverage prior to its letter of October 9, 2008. In the letter of October 9, Liberty pointed out that the employee exclusion applied and justified the denial of coverage.

¶ 26 For purposes of this appeal, we will assume that BNSF adequately alleged that Liberty informed BNSF, prior to June 2008, that the policy issued to ProBuild did not cover Aull's accident because the accident occurred on the main track, rather than the track added in accord with the 1996 track agreement. BNSF agreed to the settlement in September 2008, and in October 2008, Liberty formally wrote to BNSF that the employee exclusion applied, and therefore the policy did not require any payment from Liberty.

¶ 27 The "mend the hold" doctrine "is a general rule that, where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation

has begun, change his ground and assign another and an inconsistent cause for his action." *Larson v. Johnson*, 1 Ill. App. 2d 36, 45 (1953). The doctrine "can be seen as a corollary of the duty of good faith that the law of Illinois as of other states imposes on the parties to contracts. [Citations.] A party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith." *Harbor Insurance Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990). It applies particularly where a party's new position "is utterly inconsistent" with the original grounds given for its action. *Larson*, 1 Ill. App. 2d at 44.

¶ 28 Nothing in Liberty's conduct shows bad faith. The assertion that the accident may not have occurred in a covered location does not conflict with the assertion that the employee exclusion applies. Moreover, Liberty asserted both grounds for denying coverage prior to any litigation, and prior to any failure of either defense in court. BNSF has cited no Illinois case applying the "mend the hold" doctrine to a change in the grounds given for an action, when the party's position changed before litigation had begun. Illinois courts applying the doctrine have stated the rule as one that precludes a party from changing the grounds for its action "after litigation has begun." *Larson*, 1 Ill. App. 2d at 45; see *Ohio & Mississippi*, 96 U.S. at 267. We find that the "mend the hold" doctrine does not warrant estopping Liberty from asserting that its policy provides no coverage for the accident because of the employee exclusion. Accordingly, we affirm the judgment entered in favor of Liberty on counts III and V of the amended complaint.

¶ 29 CONCLUSION

¶ 30 The "mend the hold" doctrine does not preclude Liberty from giving a second reason for denying insurance coverage, when it presents both reasons before litigation has begun. Because the "mend the hold" doctrine does not apply, we will not find Liberty estopped from relying on the employee exclusion as grounds for denying coverage for Aull's accident. The track agreement's indemnification clause includes a provision for shared liability when both BNSF and ProBuild act negligently, and that provision makes the contract one that does not unequivocally require ProBuild to indemnify BNSF for BNSF's own negligence. Accordingly, we find that the trial court correctly entered judgment in favor of ProBuild and Liberty on BNSF's complaint.

¶ 31 Affirmed.