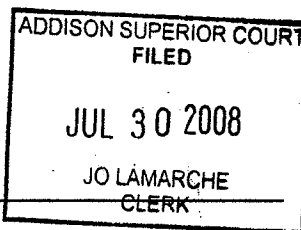


STATE OF VERMONT
ADDISON COUNTY



AMERICAN LAND TITLE, INC.
And JOHN KIRK, ESQ.
Plaintiff

v.

TICOR TITLE INSURANCE
COMPANY
Defendant

SUPERIOR COURT
Docket No. 205-8-07 Ancv

RULING ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Background

The following material facts are undisputed and are from the joint stipulation of material facts filed by the parties.

At all times relevant to this matter, American Land Title, Inc. ("ALTI") has served as title agent for Ticor Title Insurance Company ("Ticor"). The agency relationship between ALTI and Ticor was governed by an Issuing Agency Contract, as amended, dated April 2, 1982 (the "Agency Agreement"). The Agency Agreement contains the following liability allocation provision in which ALTI is referred to as "Agent" and Ticor is referred to as "Principal":

8B. When a loss occurs because of negligent errors and omissions in Agent's abstracting or examination of title, the first \$2,000.00 of loss, including attorney fees incurred in any single claim shall be borne entirely by the Agent and the excess above \$2,000.00 loss plus attorney fees incurred up to \$10,000.00 shall be borne as follows:

50% by the Agent

50% by the Principal

Any loss above \$10,000.00 shall be borne by the Principal.

An insured under a title policy issued by ALTI sued ALTI, Ticor, Kirk, and others on a variety of theories related to a title search conducted by ALTI employee, John Kirk, Esq. ("Kirk"). The claims included negligence relating to damages the insured suffered allegedly due to the fault of Kirk and ALTI. During the course of litigating that action, ALTI and Kirk demanded that Ticor take over defense of the matter and reimburse them for legal fees, costs and, later, settlement payments incurred in that action purportedly based on the terms of the Agency Agreement between Ticor and ALTI. Ticor declined to assume the defense of ALTI or Kirk.

On March 8, 2007, this court granted summary judgment in that action as to all defendants. Harperville Management, LLC, v. American Land Title, et al., No 251-11-05 Ancv (March 8, 2007). The court dismissed the insured's action against ALTI and Kirk in the underlying action, and ruled, as a matter of law, that even if ALTI and Kirk breached any duty to the insured, that breach did not cause the insured's damages. The insured appealed the court's ruling. ALTI and Kirk settled with the insured before the appeal was heard. ALTI and Kirk invited Ticor to participate in the settlement but Ticor declined. ALTI and Kirk spent \$22,000 to settle the case on their behalf and incurred \$23,000 in defense costs relating to the matter, including attorney's fees. Ticor entered into a separate settlement agreement with the insured.

In this action, ALTI and Kirk sue Ticor for indemnity and reimbursement pursuant to the liability allocation provision of the Agency Agreement. ALTI and Kirk

move for summary judgment. Ticor responds and also moves for summary judgment.¹

Discussion

The parties agree upon the material facts and the controlling law. The question before the court is whether, pursuant to the language of the Agency Agreement, Ticor assumed a duty to defend and a duty to indemnify² ALTI and Kirk with respect to damages they may have suffered by virtue of the underlying action.

1. Tateosian

The parties agree that Tateosian v. State, 2007 VT 36, controls this matter.³ Ticor argues that, based on Tateosian,⁴ it had no duty to defend beyond any assumed in the Agency Agreement, which did not create any such duty. Ticor further argues that it had no duty to indemnify ALTI and Kirk in the absence of loss incurred due to negligent errors and omissions in ALTI and Kirk's abstracting and examination of title.

In Tateosian, the Vermont Supreme Court construed an indemnity provision in a standard form procurement contract prepared by the State. That indemnity provision specified that "[t]he contractor shall indemnify, defend and hold harmless the State and

¹ Ticor also moves to strike "arguments raised by ALTI and Kirk for the first time in their Reply Brief." Given that Ticor had cross-moved for summary judgment and the reply was also a response to that motion, the court denies the motion to strike without reaching the question of whether "replies" should be so limited.

² Although the premise of ALTI and Kirk's motion is that Ticor breached a duty to defend and therefore is liable to them, in their reply they shift their argument and rely solely on the contract language as imposing a duty to indemnify. ALTI and Kirk's Reply at 2. Ticor's Reply suggests three arguments defeat ALTI and Kirk's argument regarding the duty to indemnify. Because the court agrees with Ticor's third argument that ALTI and Kirk cannot establish that they were liable after receiving the benefit of a judgment holding them not liable, the court does not reach Ticor's other two arguments.

³ Although ALTI and Kirk initially attempted to distinguish Tateosian from this matter, that attempt has been abandoned.

⁴ Ticor additionally relies heavily on ¶ 29 and ¶ 33 of 41 Am. Jur. 2d, Indemnity. Like ALTI and Kirk's counsel, the court was not able to find any of the Am. Jur. 2d paragraphs cited by Ticor. Ticor submitted to the court a copy of the material it cites from Am Jur. 2d. However, a comparison of the copy submitted by Ticor and the bound volumes available to the court shows that Ticor's citations are to the 1968 edition whereas the court's editions are from 1995.

its officers and employees from liability and any claims, suits[,] judgments, and damages arising as a result of the Contractor's performance of this contract.” Tateosian, 2007 VT, ¶ 2 (emphasis added). The Court held that the standards applicable to the contractor's duty to defend are not the same as the standards applicable to an insurer's duty to defend under a liability insurance policy and that the contractor did not have a duty to defend on any claim against the State. Specifically, the Court held “the obligations assumed through contractual indemnity differ from those an insurance company agrees to provide.” Tateosian, 2007 VT, ¶ 13. The Court further held that “[i]nsurance companies have broader defense obligations because ‘an insurance company's agreement to defend actions against the insured is one of the ‘fundamental obligations’ of the insurance contract; in contrast, the agreement to defend and indemnify in a [commercial contract] is incidental to the main purpose of the agreement” Id. (quoting Ervin v. Sears, Roebuck & Co., 469 N.E.2d 243, 249 (Ill. App. Ct. 1984)). In insurance cases, ambiguities are construed against the insurer. Tateosian, 2007 VT, ¶ 14. In indemnity cases, the contract language is interpreted “‘to give effect to the intent of the parties as that intent is expressed in their writing.’” Id. (quoting Hamelin v. Simpson Paper (Vt.) Co., 167 Vt. 17, 19 (1997)).

One of the factors discussed by the Tateosian Court that distinguishes insurance contracts from commercial indemnity contracts is the relative bargaining power of the parties and the status of insurance contracts as contracts of adhesion. ALTI and Kirk argue that Ticor had superior bargaining strength to ALTI with respect to the Agency Agreement and, therefore, the Agency Agreement should be construed in the same manner as insurance contracts are construed. The facts do not support ALTI and Kirk's

argument. Section 8 of the Agency Agreement clearly reflects that its provisions were negotiated, with Ticor foregoing its standard provisions in exchange for provisions that were more favorable to ALTI. The provision of the Agency Agreement that is central to the question before the court was not included in Ticor's pre-printed Agency Agreement. The pre-printed form contains no risk allocation to Ticor in the event of the agent's negligence. Plaintiff's Exhibit 3, Bates numbers 000003 and 000006. In 2000, the Agency Agreement was amended to provide that instead of a fifty percent split to each party the split would be seventy percent to ALTI and thirty percent to Ticor. Thus, in 2000, ALTI's compensation under the Agency Agreement increased by forty percent while the liability allocation between the parties remained unchanged. This does not support ALTI and Kirk's contention that Ticor had superior bargaining strength to ALTI with respect to the Agency Agreement

2. Duty to Defend

In this case, the language of the Agency Agreement is clear. Although Ticor is an insurer, it was not acting in the role of insurer with regard to ALTI and Kirk in this matter. Instead, the parties entered into a contractual indemnity provision in a commercial context. ALTI and Kirk presume a duty to defend, but they do not point to the source of that duty.

It is true that contracts often contain both indemnification provisions and provisions imposing a duty to defend. However, that does not mean that one automatically includes the other. See Kaydon Acquisition corp. v. Custum Manufacturing, Inc., 301 F.Supp. 2d 945, 958 (N.D. Iowa 2004), order clarified on reconsideration, 371 F.Supp.2d 896 N.D. Iowa 2004) ("The court has found no Iowa or

other authorities holding that a duty 'to indemnify and hold harmless' necessarily imposes or implies a duty 'to defend.'"); (Ferreira v. Beacon Skanska Construction Company, Inc., 296 F.Supp.2d 28, 33 (D. Mass. 2003) ("a contractual agreement to indemnify which includes a hold harmless provision and the payment of expenses, including legal fees, still does not impose an independent duty to defend.")).

The Agency Agreement does not even contain a promise by Ticor that it will "indemnify" or "hold harmless" ALTI in any circumstance. Under the Agency Agreement, when there is a loss due to negligent errors and omissions in ALTI's abstracting or examination of title, the loss is allocated between the parties. The Agency Agreement expressly applies only "[w]hen a loss occurs because of negligent errors and omissions in [ALTI's] abstracting or examination of title" Thus, the plain language of the liability allocation provision requires that the loss as to which liability is allocated between the parties be attributable to the negligence of ALTI. When such a loss occurs, the Agency Agreement imposes no duty on Ticor to take any action other than to pay the portion of the loss allocated to it. There is no language in the Agency Agreement that in any way purports to impose a duty on Ticor to defend ALTI or its employee Kirk. *Id.* This fact distinguishes this case from Tateosian, in which the indemnity provision in question expressly contained an obligation to defend, Tateosian, 2007 VT, ¶ 2, but it does not cause a different result. Based on Tateosian, the court construes the plain language of the contract between the parties and finds no ambiguity. There was no duty on the part of Ticor to defend ALTI or Kirk.

Nor is there any basis to imply a duty to defend because the relationship between the parties is not that of insurer and insured. Tateosian, 2007 VT, ¶ 14 ("We have not

applied insurance law to determine the interpretation of contractual provisions on the duty to defend or indemnify.”)

3. Liability Allocation

The court found in the prior action, as a matter of law, that the underlying insured could not prevail on its claims against ALTI and Kirk. Therefore, the requirement of the Agency Agreement that ALTI be negligent in order to impose liability on Tigor is not, and cannot be, satisfied. See Longport Ocean Plaza Condominium, Inc. v. Robert Cato & Associates, Inc., No 03-3814, 2005 WL 1394838, at **2 (3rd Cir. 2005) (The definition of indemnity “presumes an obligation to a third party that triggers the indemnitor’s obligation to the indemnitee.”) When ALTI and Kirk settled with the underlying insured, they had no legal liability to the underlying insured. Therefore, Tigor has no liability to ALTI or Kirk under the liability allocation provision of the Agency Agreement.

ALTI and Kirk contend that regardless of the lack of a duty to defend, such absence is irrelevant because the defense has already been provided. They argue the liability allocation provision of the Agency Agreement covers their damages because “[t]he law requires a comparison of the allegations of the underlying complaint with the coverage explicitly provided by the Agency Agreement.” ALTI and Kirk’s Reply at 4. They cite no authority for this proposition. Tateosian and the insurance cases cited by ALTI and Kirk in their motion⁵ hold that, with respect to a duty to defend, the “obligation to defend should be determined at the beginning of the case based on the pleadings.” Tateosian, 2007 VT, ¶ 15 (emphasis added). Nothing in Tateosian or any other case cited

⁵ All but one of the cases cited by ALTI and Kirk in support of their contention that Tigor is liable to them based upon its breach of an alleged duty to defend them involve an insurance company’s duty to defend an insured policyholder. The one case that does not involve an insurance company’s duty to defend was decided based on principles applicable to insurance companies. See Viles v. Vermont State Colleges, 168 Vt. 459, 462 (1998).

by ALTI holds that an indemnitor's obligation to indemnify for a particular actual loss is determined at the beginning of the case based on the pleadings. In this case, only if ALTI actually suffered a loss due to its negligence in performing specified acts is there any liability on the part of Ticor. Whether ALTI actually suffered a loss due to its negligence cannot be determined from the pleadings in the underlying action.

When an indemnification provision contains a condition, that condition must actually be satisfied before liability on the part of the indemnitor arises. Tuzman v. Leventhal, 329 S.E.2d 610, 614 (Ga. Ct. App. 1985); Lauer v. Blustein, 274 N.E.2d 868, 871 (Ill. App. Ct. 1971). It is not sufficient to imply satisfaction of the condition. Selectmen v. John Curtis, 2d, 1813 WL 572, at *5 (Dec. Term, 1813) (The town could not recover on the bond given by its constable to indemnify the town against damages from the neglect, default or laches of the constable because the town did not show neglect, default or laches on the part of the constable, even though the town had suffered damages. Id. at *4.) See also, Mel Clayton Ford v. Ford Motor Company, 127 Cal. Rptr. 2d 759, 767 (Cal. Ct. App. 2002)(indemnitee against negligence actions not entitled to recover from indemnitor based on settlement where negligence had not been established).


In some jurisdictions, when a claim is covered by the indemnification provision, an indemnitor can be held liable to an indemnitee that settles before trial based on the indemnitee's exposure to "potential liability" where the settlement is reasonable, the indemnitor is a party, and the indemnitor is given the opportunity to participate in the settlement talks. See e.g., Valloric v. Dravo Corp., 357 S.E.2d 207, 214 (W.Va. 1987); Iowa Manufacturing Company v. Joy Manufacturing Company, 669 P.2d 1057, 1060-61 (Mont. 1983). ALTI and Kirk note that Ticor was given the opportunity to participate in

the settlement talks and declined. It is not entirely clear, but in their reply to Ticor's motion ALTI and Kirk appear to be arguing that they were potentially liable for their own negligence so the condition to Ticor's obligation to indemnify them was satisfied. They do not cite any authority indicating that under Vermont law these facts indicate that Ticor has liability. Even if Vermont did follow such a rule, it would not be applicable in this case because ALTI and Kirk settled after they had been found to be not liable. Willard v. Interpool, Ltd., 758 A.2d 684, 687-88 (Pa. Super. Ct. 2000) (“[A] party making a voluntary payment assumes the risk of being able to prove the actionable facts upon which his liability depends”) The judgment in the underlying action is final and establishes that ALTI and Kirk have no liability. ALTI and Kirk cannot prove actionable facts upon which their liability depends because they are bound by that judgment. Fitzgerald v. Fitzgerald, 144 Vt. 549, 552 (1984); Wallace v. Berry, 51 Vt. 602, 607 (1879). As a consequence, they fail to show that their claim is covered under the provision of the Agency Agreement relieving them from a portion of the liability for their own negligence.

Order

For the reasons stated above, ALTI and Kirk's motion for summary judgment is denied and Ticor's motion for summary judgment is granted.

Dated at Middlebury this 30th day of July, 2008.


Helen M. Toor
Superior Court Judge