IN THE COURT OF APPEALS OF IOWA

No. 6-779 / 95-2208

TIG PREMIERE INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

MIDWEST METAL INDUSTRIES, INC., KENNETH BURGESS, JR., and SHERRIE BURGESS,

Defendants-Appellants.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, Phillip R. Collett, Judge.

Defendants appeal from the district court's granting of summary judgment in favor of plaintiff. **AFFIRMED.**

Richard C. Bauerle and Allan C. Orsborn of Orsborn, Bauerle & Milani, Ottumwa, for appellants.

Andrew D. Hall, Robert C. Thomson, and John Werner of Grefe & Sidney, Des Moines for appellee.

Heard by Habhab, C.J., and Huitink and Vogel, JJ.

HABHAB, C.J.

The City of Ottumwa contracted with B & R Insulation, Inc. (B & R) to perform demolition and grading work at a former packing plant. On April 18, 1991, Midwest Metal Industries, Inc. (Midwest Metal) entered into a subcontract with B & R to perform certain work in connection with the demolition. As a condition of the subcontract with B & R, Midwest Metal purchased payment and performance bonds from TIG Premiere Insurance Company (TIG) to cover its performance of the contract and as security for the payment of labor and materials. TIG required defendants Midwest Metal and its owners, Kenneth and Sherrie Burgess, to execute an indemnity agreement to cover any losses TIG might sustain. The agreement provided that TIG had "sole discretion" in determining whether any claims had to be paid. Additionally, indemnity was triggered if Midwest Metal was declared to be in default by B & R.

On December 10, 1993, B & R notified TIG that Midwest Metal was in default and its subcontract was terminated. There was a dispute between Midwest Metal and B & R as to whether the termination of the subcontract was valid. B & R subsequently made claims against TIG for additional work. TIG paid those claims. TIG requested defendants set aside a cash reserve to shield TIG from potential liability resulting from B & R's declaration of default. Defendants refused TIG's request.

TIG filed a petition against defendants for breach of contract on May 1, 1995. Subsequently, defendants filed a counterclaim alleging that because Midwest Metal was not legally in default of the contract with B & R, TIG improperly paid the claims. TIG filed a motion for summary judgment on its claim.

On September 27, 1995, the court granted summary judgment in TIG's favor. It determined it was undisputed that B & R declared Midwest Metal in default. It concluded (1) defendants failed to provide evidence showing TIG paid B & R for claims not covered by the subcontract, and (2) the indemnity agreement was not ambiguous or unconscionable. The court also incorporated its ruling in a companion case granting TIG summary judgment. In that case, the court granted TIG summary judgment as to its liability. It determined there were disputed facts as to whether the subcontract was legally terminated by B & R, but under the contract, TIG had sole discretion to determine if a claim should be paid and had the right to investigate if deemed necessary. The court found TIG was not obligated by the contract to determine if B & R properly terminated the contract with Midwest Metal.

On November 10, 1995, defendants filed a motion to reconsider asserting they had a right to defend the claim on the basis the subcontract was not properly terminated. They asserted that because the court had previously determined there was a genuine issue of fact regarding the termination and default, summary judgment was inappropriate.

TIG also filed a motion for summary judgment on the counterclaim in November 1995. On November 28, the court granted TIG summary judgment and denied the motion to reconsider. The court stated the claim of whether B & R properly declared Midwest Metal in default was separate and distinct from TIG's liability. It declared the counterclaim was barred by res judicata or, alternatively, granted summary judgment in TIG's favor based upon the identical reasoning in its order granting TIG summary judgment in the companion case. On December 8, 1995, the court entered judgment of $536,561.54 against defendants.

Defendants appeal.

I. Standard of Review. We review a district court's ruling granting summary judgment for errors at law. Iowa R. App. P. 4; *First Nat'l Bank v. Fidelity & Deposit*, 545 N.W.2d 332 (Iowa App. 1996). The court upholds a summary judgment when the moving party shows there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *see C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). On review, we determine whether a genuine issue of fact exists and whether the law was applied correctly. *First Nat'l Bank*, 545 N.W.2d at 334. The record is reviewed in the light most favorable to the nonmoving party. *Hoffnagle v. MacDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

II. TIG's Motion for Summary Judgment. Defendants maintain the district court erred in granting TIG's motion for summary judgment and contend the findings of the district court in its decision on their motion to reconsider are inconsistent. In its decision on defendants' motion to reconsider, the district court found:

> [Midwest] seeks reconsideration of this ruling on the ground that there is a factual dispute as to whether Midwest was "legally excluded" from the project. Midwest noted that the court found in Midwest's companion equity case that there was such a dispute and asserts that if Midwest was not legally excluded, then B & R Insulation has no right to make a claim on the performance bond.
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> There are two issues involving the termination of Midwest: whether Midwest was legally excluded from the project under the terms of the subcontract with B & R and whether B & R declared Midwest in default under the indemnity agreement obligating TIG to pay B & R on the performance bond. There is no factual dispute that Midwest was declared in default by B & R.
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> The issue of whether B & R properly terminated Midwest under the terms of the subcontract is still pending in Midwest's companion equity case. The issue of whether Midwest was declared in default has been settled in the court's ruling on TIG's motion for summary judgment.
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> As the court has found in its other rulings on this issue, the purpose of the performance bond and the general indemnity agreement is to insure that the project would be completed and TIG could recover if Midwest was terminated for any reason. If the court were to find otherwise, the performance bond would be rendered meaningless.

We find no inconsistency within the district court's decision. The district court was careful to point out that although B & R's declaration of Midwest Metal's default is dispositive in the present case, it was not dispositive in the companion case.

The terms of the contract clearly and unambiguously grant TIG sole discretion to determine whether B & R's claim should be paid; therefore, the district court

correctly found the validity of B & R's declaration of default is not dispositive.[1] In construing unambiguous contracts such as the one at hand, the intent of the parties, as determined by what the contract itself says, is controlling. *See McKenzie v. Eastern Iowa Tire, Inc.* 448 N.W.2d 464, 467 (Iowa 1989). We affirm the district court's grant of summary judgment in this regard.

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[1] The relevant terms of the indemnity agreement are unambiguously set forth within the contract:

> 2. INDEMNITY. The undersigned agree to indemnify and save harmless the Surety from and against any and all demands, liabilities, loss, costs, damages or expenses of whatever nature or kind, including fees of attorneys and all other expenses.
>
> . . .
>
> In furtherance of such indemnity:
>
> . . .
>
> A. Surety shall have the right *in its sole discretion* to determine whether any claims shall be paid, compromised, defended, prosecuted or appealed.
>
> . . .
>
> 3. DEFAULT. Principal shall be in Default with respect to a contract and hereunder if any of the following occur:
>
> . . . .
>
> B. Any Obligee declares Principal to be in Default.
>
> . . .
>
> 4 REMEDIES UPON DEFAULT. In the event of Default, as defined above, Surety may *at its option and sole discretion*:
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> A. Take over any project and arrange for its completion.
>
> . . .
>
> 5. COLLATERAL SECURITY. If a claim is made against a Surety, *whether disputed or not*, or if Surety deems it necessary to establish a reserve for potential claims, and upon demand from Surety, the undersigned shall deposit with Surety cash or other property acceptable to Surety, as collateral security, in sufficient amount to protect the Surety with respect to such claim or potential claims and any expense or attorney's fees.

(Emphasis added.)

Defendants additionally assert the contract was unconscionable and as a result should be nullified. It is defendants' burden to show the unconscionability of the contract. *See Lakeside Boating & Bathing, Inc. v. State*, 402 N.W.2d 419, 422 (Iowa 1987). In considering a claim of unconscionability, we examine the factors of assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness. *Gentile v. Allied Energy Products, Inc.*, 479 N.W.2d 607, 609 (Iowa App. 1991). We find the district court correctly granted TIG's motion for summary judgment in this regard as no facts within the record support nullification of the indemnity agreement as unconscionable. Furthermore, as the record does not support defendants' assertion TIG paid B & R for claims not covered by the subcontract, we affirm the district court's decision in that regard as well.

In reviewing the district court's decision in the light most favorable to defendants, we find no genuine issue of fact exists and the district court's grant of summary judgment was proper.

III. Motion for Summary Judgment on Counterclaim. Defendants argue the district court erroneously granted TIG's motion for summary judgment on their counterclaim. They assert the court erroneously determined the claim to be barred due to res judicata by issue and claim preclusion. We disagree.

Issue preclusion, also known as collateral estoppel, serves the dual role of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless

litigation. *Federal Land Bank v. Dunkelberger*, 499 N.W.2d 305, 308 (Iowa App. 1993) (citing *Harris v. Jones*, 471 N.W.2d 818, 819 (Iowa 1991)). Issue preclusion applies when a party attempts to relitigate an issue which has already been raised and decided in a prior action. *Matsui v. King*, 547 N.W.2d 228, 230-31 (Iowa App. 1996) (citing *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (1981)).

The four elements of issue preclusion are: (1) the issue must be identical in the two actions; (2) the issue must be raised and litigated in the prior action; (3) the issue must be material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must be necessary and essential to the judgment. *Matsui*, 547 N.W.2d at 231 (citing *Ackley State Bank v. Haupt*, 451 N.W.2d 495, 496 (Iowa 1990)).

For claim preclusion to apply, the two lawsuits must involve the same parties and the same claim. *Id.* at 232 n.7. Claim preclusion prevents a party from splitting or trying his or her claim piecemeal, and requires a party to put in issue and try his or her entire claim or put forth his or her entire defense. *See id.* It applies only when the claim for relief litigated in the previous proceeding was the same as the claim in the present action. *Id.*

We agree with the district court's findings that the previous determination of TIG's liability in the companion case was necessary and essential and as such material to the motion for summary judgment. The issue of TIG's liability is identical. The claim was between the same parties. It was raised and litigated by both parties

and properly disposed of on summary judgment. We have reviewed the district court's decision in the light most favorable to defendants. We find no genuine issue of fact exists. As such, the district court's grant of summary judgment was proper.

AFFIRMED.