Filed 2/28/18 City of Fresno v. 21st District Agricultural Assn. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF FRESNO, Plaintiff and Appellant, v. 21ST DISTRICT AGRICULTURAL ASSOCIATION, Defendant and Respondent.	F073957 (Super. Ct. No. 14CECG02830) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Parker, Kern, Nard & Wenzel and Eric V. Grijalva for Plaintiff and Appellant.

Murphy, Campbell, Alliston & Quinn, George E. Murphy and Suzanne M. Nicholson for Defendant and Respondent.

-ooOoo-

The resolution of the present appeal turns on the interpretation of the parties' contract with respect to the matter of indemnification. The City of Fresno (City) entered into a written contract with the 21st District Agricultural Association, Big Fresno Fair (District) whereby the City agreed to provide onsite police protection and law enforcement services to the Big Fresno Fair (contract). The contract contained a broad indemnification provision requiring the District to indemnify the City from all claims, expenses or liability occasioned by the City's performance of the contract. However, the contract also required the City to maintain certain insurance coverages "protecting the legal liability" of the District, including workers' compensation coverage. The City's method of furnishing such insurance coverage during the term of the contract was self-insurance. In October of 2012, while providing law enforcement services at the Big Fresno Fair pursuant to the contract, two of the City's police officers were injured when attempting to restrain a belligerent patron. The injuries resulted in the City paying out workers' compensation benefits for the two police officers. Later, the City sought to recover these amounts from the District under the contract's indemnification provision. When the District refused to indemnify the City, the present action for breach of contract was commenced by the City against the District.

The parties filed cross motions for summary judgment in the trial court, with the City and the District each arguing alternative interpretations of the contract. The trial court agreed with the District that the specific insurance requirement placed the risk of loss for workers' compensation claims for police services performed under the contract squarely on the City. The trial court explained that this interpretation did not render the indemnification provision meaningless or inoperative because that provision would still apply to uninsured losses. Further, to the extent the two provisions were actually in conflict, the trial court followed the rule that a specific provision in a contract controls a general one. For these reasons, the trial court held that the District did not breach the

indemnification provision, and consequently, the District's motion for summary judgment was granted and the City's motion was denied. The City appeals from the resulting final judgment. We conclude the trial court correctly construed the parties' contract. Accordingly, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The Contract

In 2011, the City and the District entered into the subject contract. In that contract, the City agreed to provide police protection and law enforcement services to the Big Fresno Fair that would be held in October of 2011, 2012 and 2013. The District agreed to pay the City approximately $700,000 over the three-year term, which amount was apparently calculated based on the estimated costs of providing police officers and other law enforcement personnel to protect the Big Fresno Fair.

The contract included the following indemnification provision in favor of the City:

> "The [District] shall defend, indemnify and save harmless the [City], its officers, agents and employees from any and all claims, demands, damages, costs, expenses or liability arising out of this agreement or occasioned by the performance or attempted performance of the provisions hereof except those arising from the negligence or willful misconduct of the [City]."

Elsewhere in the written contract, a preprinted indemnification provision in favor of the District was crossed out.

The contract also attached and incorporated by reference an Exhibit E thereto, which was a two-page document setting forth the "Insurance Requirements" imposed on the City by the District. The first paragraph of the insurance requirements provision in the contract stated as follows regarding the need to provide evidence of coverage: "The [City] shall provide a signed original evidence of coverage form for the term of the agreement protecting the legal liability of the [District] . . . from occurrences related to operations under the contract." Among the several types of coverage that had to be

maintained (and adequately evidenced) by the City was workers' compensation coverage for the City's employees. The contract allowed the City to provide evidence of coverage by means of a certificate of insurance from an insurance company, or alternatively, by evidence of self-insurance if the City "is self-insured and acceptable evidence of self-insurance has been approved by California Fair Services Authority." The City was required to make sure that the specified insurance coverage, including workers' compensation, remained in effect at all times during the term of the contract. If the City failed to maintain the required coverage, the District could declare the City to be in material breach and terminate the contract, or obtain substitute coverage and charge the premiums for said coverage to the City. Further, the City's insurance coverage was to be "primary" over any separate coverage available to the District.

During the relevant time period, the City elected to meet the insurance requirements specified in the contract (as described above) through self-insurance, and it provided to the District a certificate of self-insurance that confirmed the existence of self-insurance coverage for workers' compensation, general liability and automobile liability, among other types of coverage.

Police Officers Injured / City Pays Workers' Compensation Benefits

In October of 2012, while performing policing duties under the contract, two police officers were injured when attempting to restrain a patron at the Big Fresno Fair who had become unruly and was acting in a threatening manner. As a result of the injuries they sustained, the two police officers required medical treatment, which triggered the payment of workers' compensation benefits to the police officers by the City. The total amount paid by the City as workers' compensation benefits for the two police officers was $176,669.05.

The City's Complaint for Breach of Contract

On November 20, 2014, the City filed its complaint against the District for breach of contract. The complaint alleged that the District breached the contract because it refused to indemnify the City, as required under the contract's indemnification provision, for amounts the City was required to pay the two officers as workers' compensation benefits.

Cross-motions for Summary Judgment

On January 25, 2016, the City and the District filed cross-motions for summary judgment. The issue in both motions involved the legal interpretation of the contract. The critical question was whether the indemnity provision in the contract required the District to indemnify the City for its payment of workers' compensation benefits to the injured police officers (as argued by the City), *or*, whether the contract's insurance requirement specifically allocated the risk of loss for workers' compensation claims to the City (as argued by the District).

The Trial Court's Ruling

Following the hearing on the motions for summary judgment on April 27, 2016, the trial court adopted its tentative ruling as the order of the court, which was to grant the District's motion for summary judgment and to deny the City's motion for summary judgment. The trial court acknowledged in its order that the essential issue before it was whether the District breached the indemnity provision. The trial court agreed with the District that the insurance requirements allocated the risk of loss for workers' compensation benefits to the City, and that the more specific insurance requirement controlled over the more general indemnification provision. Thus, the trial court held the District did not breach the indemnity provision.

Judgment in favor of the District was entered on May 4, 2016, and the District served a notice of entry of judgment on May 20, 2016. The City timely filed its notice of appeal from the judgment.

DISCUSSION

I. Standard of Review

Although framed in the context of cross-motions for summary judgment, the focus of the present appeal is on the question of whether the trial court correctly interpreted the parties' written contract. It is undisputed that if the trial court correctly construed the contract, then the District was entitled to judgment as a matter of law because there would have been no breach of the indemnification provision. An issue of contractual interpretation is one of law. " 'It is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence.' " (*Hess v. Ford Motor Co*. (2002) 27 Cal.4th 516, 527.) On appeal, we review such issue de novo. (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.)

II. Principles of Contract Interpretation

The fundamental goal of contractual interpretation is "to give effect to the mutual intention of the parties." (Civ. Code, § 1636[1]; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "We ascertain that intention solely from the written contract, if possible, but also consider the circumstances under which the contract was made and the matter to which it relates." (*Starlight Ridge South Homeowners Assn v. Hunter-Bloor* (2009) 177 Cal.App.4th 440, 447 (*Starlight Ridge*); § 1647.) "When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement." (*Klein v. Chevron U.S.A., Inc*. (2012) 202 Cal.App.4th 1342, 1385; §§ 1638

---

1 All further statutory references are to the Civil Code unless otherwise indicated.

["[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"], 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) Further, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (§ 1641.) "The interpretation of a contract 'must be . . . reasonable, not leading to absurd conclusions.' " (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 842; see § 1643.) "[T]he court shall avoid an interpretation which will make a contract extraordinary, harsh, unjust, inequitable or which would result in absurdity." (*County of Marin v. Assessment Appeals Bd*. (1976) 64 Cal.App.3d 319, 325, italics omitted.)

Where possible, courts are to interpret contractual language in a manner that gives force and effect to every provision, and not in a way that would render a provision nugatory, inoperative or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 (*City of Atascadero*); *Titan Corp. v. Aetna Casualty & Surety Co*. (1994) 22 Cal.App.4th 457, 474; § 1641; Code Civ. Proc., § 1858.) The effect of this rule is "to disfavor constructions of contractual provisions that would render other provisions surplusage." (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 503 (*Boghos*).)

Where terms of a contract are inconsistent, a more specific provision will control over a more general one. (*Starlight Ridge, supra*, 177 Cal.App.4th at p. 447; Code Civ. Proc., § 1859.)

III. Trial Court Correctly Interpreted the Contract

We briefly summarize the two provisions at issue. With respect to the insurance of risks, the contract specifically required the City to maintain certain insurance coverages (including workers' compensation) for the purpose of "protecting the legal

liability" of the District. The required insurance coverages had to remain in effect during the entire term of the contract and a failure to have them in place would give the District the right to declare a material breach or to obtain substitute insurance coverage and deduct premiums from any sums due to the City. Further, the insurance coverages provided by the City had to be primary over other coverage. With respect to indemnification, the contract contained a broad indemnification provision in favor of the City. The indemnification provision generally provided that the District shall indemnify the City for all claims, expenses or liability arising out of or occasioned by the performance of the contract by the City. In the present case, the crux of the interpretive issue before us is how to reasonably reconcile the contract's insurance requirements with the indemnification provision.

In its appeal, the City asserts that even though it was specifically required to provide insurance coverage for workers' compensation claims, the indemnification provision nevertheless applied to its payment of workers' compensation benefits to the two injured officers. The District responds that the City's position does not make sense, and the District poses the following poignant question: "Why would the parties agree that the City should be the party to maintain coverage for certain types of losses, but then, if the City elected to be self-insured turn around and require the [District] to indemnify the City for those same losses?" We agree with the District that the City's position is inadequate and untenable because it does not take both of the subject provisions into reasonable account.

It appears that the most reasonable way to harmonize the two provisions is to recognize, as the trial court did, that the insurance requirements placed the risk of loss on the City for claims covered by the agreed-upon insurance coverage (such as payment of workers' compensation benefits), while the indemnification provision required the District to indemnify the City for all other (e.g., uninsured or uncovered) losses that

might arise out of the provision of services under the contract, excepting those relating to the City's own negligence or willful misconduct. This interpretation is a reasonable reconciliation of the two contrasting provisions in a manner that gives meaningful effect to both, while avoiding any absurd or unreasonable results. (§§ 1641, 1643.) Moreover, to the extent that the two provisions were in conflict, the more specific insurance requirements would control over the more general indemnification provision, as the trial court rightly held. (*Starlight Ridge, supra,* 177 Cal.App.4th at p. 447; Code Civ. Proc., § 1859.) Accordingly, we adopt the trial court's and the District's interpretation as the most reasonable one.

We briefly address below several additional arguments raised by the City in its appeal, which we find in each instance to be inadequate to persuade us to reach a contrary conclusion.

The City argues that because workers' compensation liability is by definition limited to employers, and the City was the employer, the language in the contract reflecting that such coverage was for the purpose of protecting the District from legal liability must be read as "unenforceable or inconsistent, and therefore excluded from the interpretation of the contract." We disagree. As pointed out by the District, the insurance provision *does* protect the District in certain significant respects: "If the City did not maintain such coverage, injured employees might be more likely to assert claims against the [District] in addition to their 'employer' the City, or seek to hold the [District] responsible via allegations that the [District] exerted sufficient control over their work that it could be considered their employer." Moreover, as the District further observes, "the most obvious protection received by the [District] via the City's maintenance of workers' compensation coverage" under the terms of the contract's insurance requirements "is that the risk of loss for injuries sustained by City employees performing work under the contract is placed on the City, and the [District] is thereby not required to

reimburse the City for those losses under the contract's more general indemnity provision." Although the language in the contract indicating that the listed insurance coverages were to "protect[] the legal liability" of the District may have lacked precision, especially in regard to workers' compensation issues, that does not mean the provision was unenforceable or should be treated as a nullity. An interpretation that gives effect to each provision of the contract is to be preferred over one that renders parts of the contract inoperative. (*Boghos*, *supra*, 36 Cal.4th at p. 503; *City of Atascadero*, *supra*, 68 Cal.App.4th at p. 473; § 1641; Code Civ. Proc., § 1858.) Here, the interpretation that gives reasonable and operative effect to the insurance requirements provision concerning the stipulated insurance coverages (including workers' compensation) is the one we have adopted herein—namely, that it placed the risk of loss on the City for claims covered by the agreed-upon insurance coverage.

The City argues that the only way the District could avoid its contractual obligation to indemnify the City would be by means of a "waiver of subrogation." According to the City, since no waiver of subrogation was ever entered by the parties, the indemnification provision must apply. No cogent explanation is offered for why a waiver of subrogation would be required where, as here, the parties' own agreement has endeavored to allocate the risk of loss between them through insurance. In any event, since the City provides no authority or meaningful legal discussion on this issue, we treat the point as forfeited on appeal and disregard it. (*Nelson v. Avondale Homeowners Assn*. (2009) 172 Cal.App.4th 857, 862; *Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com*. (2006) 135 Cal.App.4th 793, 814.)

Next, the City argues that because a preprinted indemnity provision in the contract in favor of the District had been crossed out by the parties, and instead the parties agreed to the existing indemnity provision in favor of City, the contract clearly evidenced the parties' intention that the City should not have to indemnify the District. However, this

argument is misplaced because no contention has been made that the City was or is required to indemnify the District. Although it is true that the contract, as correctly interpreted by the trial court, placed the risk of loss for workers' compensation claims on the City (at least to the extent of the City's insurance coverage for such claims), that is not the same thing as requiring the City to indemnify the District for the District's losses or liabilities. The contract does the former, but not the latter. Thus, this argument by the City falls short.

The City argues that because the bulk of the risks associated with the performance of the services under the contract are protected against though the City's maintenance of insurance coverage, and because the indemnification provision excludes the City's negligence or willful misconduct, it is unlikely that the indemnification provision would ever apply. In other words, the City is claiming that under the trial court's interpretation of the contract, the indemnity provision is largely superfluous. We reject the City's argument. Although the indemnification provision, acting as a sort of catch-all provision with respect to uninsured or uncovered losses, may potentially only apply in rare circumstances, that does not render it inoperative or superfluous.

Finally, the City argues that the conflicting provisions in the contract created ambiguity and such ambiguity may be resolved through a consideration of parole evidence. According to the City, the parole evidence revealed that the contract was supposed to be revenue neutral to the City. However, the City fails to identify the purportedly relevant extrinsic evidence by specific citation to the record. Where the necessary citation to the record is lacking, that portion of the party's argument "may be . . . deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) Additionally, the City's cursory argument on the effect of parole evidence is inadequate for purposes of appeal, and we accordingly disregard it. (*Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 482 [argument

raised in perfunctory fashion, without adequate discussion, will be deemed forfeited]; *Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699–700.) For these reasons, we find the City's parole evidence argument to be forfeited.

We note in passing that the trial court deemed the proffered extrinsic evidence to be irrelevant, including the declaration of the City's Chief of Police (stating the Chief of Police's expectation that the contract would be revenue neutral by covering the cost of providing officers to the Fair and of administering the program) and the deposition of the City Manager (stating the City's desire to be held harmless from costs associated with the Fair). The trial court refused to consider such evidence because the statements merely embodied the individuals' subjective intent or understanding about what they thought the contract should accomplish. By way of further explanation, the trial court quoted the following summary of the law: "California recognizes the objective theory of contracts (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 948), under which '[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation.' (*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist*. (1985) 164 Cal.App.3d 1122, 1127). The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc*. (2003) 109 Cal.App.4th 944, 956.)

In the present appeal, the City has failed to make any argument, cogent or otherwise, to demonstrate the trial court erred in refusing to consider such parole evidence. Moreover, even if considered, the statements offered by the City at most reflected that the City intended the contract price to cover the cost of the officers' salaries and the administrative cost of the program. No clear express statement or other evidence was presented to the trial court about the payment of workers' compensation claims or the costs associated with workers' compensation.

Based on all of the foregoing, we conclude the trial court's interpretation of the contract was correct, and therefore the District did not breach the indemnification provision of the contract. Accordingly, the District's motion for summary judgment was properly granted by the trial court and the City's motion for summary judgment was properly denied.

DISPOSITION

The judgment is affirmed. The District is entitled to its costs on appeal.

_____
HILL, P.J.

WE CONCUR:

_____
GOMES, J.

_____
FRANSON, J.