IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRANSPORTATION INSURANCE COMPANY, Plaintiff,	CIVIL ACTION
v.	NO. 99-CV-1865
SPRING-DEL ASSOCIATES, Defendant, Third Party Plaintiff,	
v.	
KAT-MAN-DU CORPORATION, Third Party Defendant.	

MEMORANDUM

ROBERT F. KELLY, J. NOVEMBER 28, 2000

This is an indemnity action arising out of the settlement of a lawsuit which was filed by Stephen Middleton ("Mr. Middleton") after he was struck by a car driven by a drunk driver as he was walking along Delaware Avenue in Philadelphia, Pennsylvania. Before this Court are the following five Motions for Summary Judgment: (1) Defendant Spring-Del Associates' ("Spring-Del") Motion for Summary Judgment with Regard to Claims Asserted by Plaintiff Transportation Insurance Company ("Transportation") as Subrogee of Waterfront Renaissance Associates ("WRA"); (2) Spring-Del's Motion for Summary Judgment with Regard to the Claim Asserted by Transportation in its Capacity as Subrogee of Public Storage, Inc. ("PSI"); (3)

Transportation's Motion for Summary Judgment as to Count III of its Complaint asserted against Spring-Del; (4) Transportation's Motion for Partial Summary Judgment with Respect to Spring-Del's Affirmative Defense XII and Counter-Claim against Transportation; and (5) Third Party Defendant Katmandu Corporation's ("Katmandu") Motion for Summary Judgment asserted against Transportation and Spring-Del. For the reasons that follow, Spring-Del's Motion for Summary Judgment with Regard to Claims Asserted by Transportation as Subrogee of WRA is GRANTED, Summary Judgment is accordingly granted in favor of Spring-Del as to Count III of Transportation's Complaint, and the remaining motions are denied.

I. BACKGROUND.

Transportation issued a commercial general liability insurance policy, with PSI, WRA, and CMR D.N. Corporation ("CMR") named as insureds or additional insureds. WRA owned property on Delaware Avenue in Philadelphia, Pennsylvania ("the property"). PSI allegedly served as WRA's property manager with respect to the property. Pursuant to two Ground Lease Agreements[1], WRA leased portions of the property to Spring-Del for use as a parking lot between the hours of 8:00 a.m. and 6:00 p.m. According to Transportation, Spring-Del erected a fence on the portion of the property which abutted Delaware Avenue on one side

[1] The Ground Lease Agreements were dated November 1, 1989 and May 1, 1990, respectively.

which read “FREE SELF PARKING.”

Spring-Del subleased portions of the property to Katmandu. Katmandu allegedly used the subleased property as a parking lot for the patrons of its restaurant between 6:00 p.m. and 3:00 a.m on weekdays and all hours on weekends. Katmandu retained the services of a valet service. Spring-Del claims Katmandu was the one who put up the “FREE SELF PARKING” sign.

On or about April 4, 1994, Mr. Middleton was walking along Delaware Avenue at 1:30 a.m. near the two leased parcels and the fence with the “FREE SELF-PARKING” sign. Cars were parked along the portion of the road that abutted Spring-Del’s fence, perpendicular to the fence. This forced Mr. Middleton to have to walk behind the cars, on a cobblestone portion of Delaware Avenue. Mr. Middleton was hit by a speeding drunk driver and was seriously injured and paralyzed. He and his wife filed a negligence suit (the “Middleton suit”) against Transportation’s insureds and Spring-Del claiming that they failed to maintain a sidewalk area outside the fence for pedestrians; failed to provide proper warnings and lighting, created a dangerous and hazardous condition; and failed to provide a safe means of passage for pedestrians. They also alleged that Spring-Del encouraged parking in an area which should have been a sidewalk by putting up the fence and the parking sign, and that cars in fact parked there. As a result,

the Middletons alleged that Mr. Middleton was forced to walk closer to the road.

Transportation's insureds notified it of the Middleton suit, and Transportation defended in that action. WRA tendered the defense of the Middleton suit to Spring-Del, which Spring-Del rejected. Various defendants settled in the Middleton suit. Spring-Del was released for $100,000 and the Insureds were released for $1,500,000, of which Transportation funded $1,000,000. Transportation also incurred &200,000 in fees and costs in defending the Insureds in the Middleton action.

The rights of the insureds for any defense costs and settlement amounts from Spring-Del were transferred to Transportation pursuant to the insurance policy. Spring-Del refused to assume the defense of WRA or the other insureds and refused to indemnify and hold them harmless. Transportation, as assignee and subrogee of WRA, filed a complaint seeking indemnity against Spring-Del on April 1, 1999. Spring-Del joined Katmandu as a Third-Party Defendant, alleging that under the sublease, Katmandu is liable over to Spring-Del under Transportation's indemnification claims. On March 3, 2000, Transportation amended the complaint to include an indemnity claim against Katmandu.

II. <u>STANDARD OF REVIEW</u>.

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the

nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.[2] Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

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[2] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Professional Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa.) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

III. DISCUSSION.

A. Spring-Del's Motion for Summary Judgment with Regard to the Claims Asserted by Transportation as Subrogee of WRA.

Transportation, as subrogee of WRA, brings claims against Spring-Del for common law and contractual indemnification, breach of contract and failure to maintain the leased premises. Transportation seeks recovery of the $1,000,000.00 it paid in settlement in the Middleton action, plus approximately $200,000.00 in fees and costs it incurred in defending WRA. Spring-Del argues that Transportation's claims asserted as subrogee of WRA should be dismissed because of a release that WRA executed to Spring-Del's benefit in consideration for Spring-Del's payment of $2,776,61. The release is contained in the two Ground Leases for the parking lots between WRA and Spring-Del and provides as follows:

> That Waterfront Renaissance Associates, L/P c/o Carl Marks & Co., Inc. 135 East 57th St., New York NY 10022 for and in consideration of Two thousand seven hundred seventy-six dollars and sixty one cents ($2,766.61) do hereby remise, release, and forever discharge Spring-Del Associates a Pennsylvania General Partnership, its partners, and its agent U.S. Realty Associates, Inc., their heirs, executors and administrators (or its successors and assigns), of and from any and all manner of actions and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or equity, especially any and all claims arising, concerning, or with regard to those two certain Lease Agreements between Waterfront Renaissance Associates, L.P. as Lessor and Spring-Del Associates as Lessee dated November 1, 1989 and May 1, 1990 respectively for those two certain parking lots at the southwest corner

> of Delaware Avenue and Noble Street, Philadelphia, Pennsylvania.
>
> Which against the said Spring-Del Associates, its partners, and its agent U.S. Realty Associates, Inc., ever had, now has (or have), or which their heirs, executors, administrators, successors or assigns or any of them, hereafter can, shall or may have, for or by reason of any cause, matter or thing whatsoever, from the beginning of the world to the date of these presents.

Spring-Del argues that the above release is so general and broad that it releases all claims WRA may have against Spring-Del. Spring-Del also asserts that WRA was aware of the Middleton claims against it when it signed the release, since it was served with a writ of summons in that case on May 2, 1995 and signed the release approximately four weeks later. Therefore, Spring-Del argues that WRA should not be permitted to evade the broad effect of the release.

Transportation argues that the release in question was not a general release of all claims that might arise concerning the parking lots, but was created in connection with a discrete dispute between WRA and Spring-Del over rent Spring-Del owed in arrears. WRA claims that, after negotiations, it released Spring-Del from some overdue rent after Spring-Del sent it a check along with what it refers to as a “fill-in-the-form” release. WRA asserts that correspondence contemporaneous with

the release supports this argument.[3] WRA argues that the fact that the amount Spring-Del paid in consideration for the release is the amount it allegedly owed for rent establishes that the release was meant solely to relate to the rent dispute. Transportation further argues that the amount of consideration of the release is clearly disproportionate to the broad interpretation of the release Spring-Del offers, since for less than $3,000 it would release Spring-Del from a 1.2 million contract and indemnity claim which did not accrue until three years after the release was made. Finally, Transportation asserts that while WRA was served with the writ of summons in the Middleton litigation four weeks before it executed the release, it did not receive the Complaint until nine days later. Accordingly, Transportation argues that WRA "could not have known of the potential indemnity obligations owed by Spring-Del" until it received the Complaint. (Transportation's Br. Opp'n Spring-

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[3] Specifically, Transportation relies upon a letter WRA received from Laurence Berk, Esquire, on behalf of Spring-Del which stated

> In response to your letter of May 9, 1995, I have prepared a Release in the amount I have determined to be due under the two Lease Agreements pursuant to my prior correspondence. Please cause the same to be executed and returned to me. I will then have a check in that amount to be issued.

Transportation also argues that the testimony of WRA's representative, David Sloss, Esquire, contradicts the notion that the release was intended to cover any disputes beyond the rent dispute.

Del's Mot. Summ. J. with Regard to Claims Asserted by Transportation as Subrogee of WRA at 14).

The United States Court of Appeals for the Third Circuit ("Third Circuit") has stated that "commercial parties are free to contract as they desire." Mellon Bank, N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1009 (3d Cir. 1980)(citing Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174 (3d Cir. 1979)). "Absent illegality, unconscionableness, fraud, duress, or mistake the parties are bound by the terms of their contract." Id. (citing Peter J. Mascaro Co. v. Milonas, 166 A.2d 15 (Pa. 1960); National Cash Register Co. v. Modern Transfer Co., 302 A.2d 486 (Pa. 1973)). Moreover, "[i]n construing a contract, a court's paramount consideration is the intent of the parties." Id. (quoting O'Farrell v. Steel City Piping Co., 403 A.2d 1319, 1324 (Pa. 1974)). However, in interpreting a contract, "the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent." Id. Moreover, the strongest indicator of agreement between parties to a contract is the words they use in the written contract. Id. Further,

> a court will make no inference or give any construction to the terms of a written contract that may be in conflict with the clearly expressed language of the written agreement . . . . A court is not authorized to construe a contract in such a way as to modify the plain meaning of its words, under the guises of interpretation . . . . When a written contract is clear

> and unequivocal, its meaning must be determined by its contents alone.

Id. (internal citations and quotations omitted).

In the instant case, the language of the unambiguous release is so general, releasing Spring-Del from all possible liability arising from the leased premises, that Transportation's arguments that the release should be read narrowly to pertain only to liability in connection with unpaid rent is illogical. Indeed, this Court would have to completely disregard almost all of the language contained in the release in order to come to the conclusion Transportation urges. Moreover, if WRA had intended to confine the release to issues that may arise concerning the rent dispute, it could easily have qualified the release accordingly. However, as it was, it clearly and plainly encompassed all potential liability on Spring-Del's part. It was also executed after WRA at least had notice of the Middleton claims. Accordingly, summary judgment is granted in favor of Spring-Del as to this claim.

B. Transportation's Motion for Summary Judgment on Count III of the Complaint.

Transportation moves for summary judgment against Spring-Del on Transportation's breach of contract claim. Transportation claims that Spring-Del breached section 2.2 on each of the Ground Leases entered into between Transportation and Spring-Del by failing to name WRA as an additional insured, as

allegedly required by section 2.2. Section 2.2 provides that

> (A) Tenant [Spring-Del] shall, during the Term hereof and any extension thereof, at Tenant's sole expense, keep in full force and effect policies of comprehensive general liability insurance with respect to the Leased Premises and the business operated by Tenant and any subtenants of Tenant at the Leased Premises in the amount of at least $500,000 combined single limit for bodily injury and property damage. Said insurance shall name Landlord [WRA] as an additional insured.

Section 5.1 provides

> Tenant agrees to and shall indemnify and hold the Landlord free and harmless from and shall defend the others against any and all claims, damages, losses, costs, expenses and liabilities, including attorney's fees for injury, death or damage to any person or property whatever, arising from any negligence or misconduct of tenant or its invitees or arising from any use made or things done or occurring on the Leased Premises unless arising through the negligence of the Landlord or its agents, servants or employees. This provision shall not relieve the insurance obligations of the parties under this Lease Agreement.

In 1993, WRA allegedly requested that Spring-Del produce certificates of insurance naming WRA as an additional insured under Spring-Del's liability policy pursuant to section 2.2. Spring-Del claims that its counsel contacted its broker and requested that WRA be added as an additional insured. However, the broker's representative denied ever receiving this request. WRA did not learn that it was not covered under Spring-Del's policy until after the Middleton accident.

After WRA notified Spring-Del that it would be seeking coverage for the Middleton claim, Spring-Del allegedly informed WRA for the first time that it was not covered under Spring-Del's

insurance policy. Spring-Del also refused to indemnify WRA under the leases. Accordingly, WRA had to defend in the Middleton suit. Transportation, WRA's liability carrier, had to pay $1,000,000 on WRA's behalf, as well as $200,000 in counsel fees and costs. Transportation, as subrogee for WRA, brings this Motion for summary judgment with respect to Spring-Del's failure to comply with the lease terms requiring that WRA be named as an additional insured under its liability policy. However, as discussed above, Spring-Del cannot be held liable for this claim because of the general release WRA issued to Spring-Del. Accordingly, summary judgment is granted as to this claim as well.

C. Remaining Motions.

Because the record in this case demonstrates that genuine issues of material fact exist as to the remaining motions, summary judgment is denied as to those motions.

An appropriate Order follows.

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v.	NO. 99-CV-1865
SPRING-DEL ASSOCIATES, Defendant, Third Party Plaintiff,	
v.	
KAT-MAN-DU CORPORATION, Third Party Defendant.	

ORDER

AND NOW, this 28th day of November, 2000, upon consideration of the Motions for Summary Judgment presently before this Court, it is hereby ORDERED as follows:

(1) Spring-Del Associates' ("Spring-Del") Motion for Summary Judgment with regard to claims asserted by Plaintiff

Transportation Insurance Company ("Transportation") as subrogee of Waterfront Renaissance Associates ("WRA") is GRANTED;

(2) Transportation's Motion for Summary Judgment as to Count III of its Complaint asserted against Spring-Del is DENIED[4];

(3) Spring-Del's Motion for Summary Judgment with Regard to Claims Asserted by Transportation as Subrogee of Public Storage Management, Inc. ("PSI") is DENIED;

(4) Transportation's Motion for Partial Summary Judgment with Respect to Spring-Del's Affirmative Defense XII and Counter-Claim against Transportation is DENIED; and

(5) Third Party Defendant Katmandu Corporation's ("Katmandu") Motion for Summary Judgment is DENIED.

BY THE COURT:

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Robert F. Kelly, J.

[4] Spring-Del has not filed a Cross-Motion for Summary Judgment as to this claim. However, because we conclude that the general release entered into between WRA and Spring-Del covers all liability arising in connection with the property, summary judgment in favor of Spring-Del is necessarily warranted as to this claim.