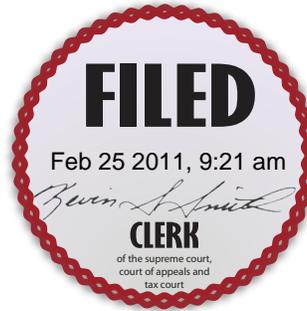


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANTS:

ATTORNEY FOR APPELLEE:

J. DAVID HOLLINGSWORTH
BRENT R. BORG
Church, Church, Hittle & Antrim
Fishers and Noblesville, Indiana

ROBERTO A. RAMIREZ
Ice Miller LLP
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

D P T INC a/k/a DPT, INC. d/b/a DOC'S)
LIQUORS and DANIEL TIPLICK a/k/a DAN)
P. TIPLICK,)
)
Appellants-Defendants/Counter-Plaintiffs,)
)
vs.)
)
WESTERN UNION FINANCIAL SERVICES,)
INC.,)
)
Appellee-Plaintiff/Counter-Defendant.)

No. 49A04-1007-CC-426

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0709-CC-37998

February 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

DPT, Inc., doing business as Doc's Liquors ("Doc's"), had an agency agreement with Western Union so that Doc's could sell Western Union services. On August 24, 2006, an unidentified person, who apparently had obtained some confidential information, used Doc's Western Union account to make several fraudulent transfers. The parties disagreed as to who bore the risk of loss, leading Western Union to file suit against Doc's and its owner, Daniel Tiplick, who had signed a personal guaranty. Doc's and Tiplick (collectively "Appellants") filed a counterclaim for indemnity against Western Union. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment for Western Union. Because the language of the agency agreement unambiguously required Doc's to carry insurance covering losses due to dishonest or illegal activity, we affirm.

Facts and Procedural History

On December 18, 2002, Tiplick, on behalf of Doc's, entered into an agency agreement with Western Union so that Western Union services could be offered at Doc's. Tiplick also signed a personal indemnity and guaranty agreement. When a customer would come to Doc's to transfer money, Doc's would receive the money and place it in its own account. Western Union would use its own funds to pay the money to the transferee and then would reimburse itself from Doc's account.

On August 24, 2006, John Duckett, an employee of Doc's, received a call, which Doc's caller ID indicated was from Western Union. The caller was a woman who claimed to be a Western Union employee. She was able to provide Duckett with confidential code

numbers unique to Doc's. She told Duckett that Western Union's computer system was down and they would be unable to process any money transfers for twenty-four to forty-eight hours.

During that timeframe, numerous fraudulent transfers, totaling over \$23,000, were made using Doc's account information. Tiplick discovered the fraud a few days later, apparently after Western Union had paid out the funds, but before it had completely reimbursed itself from Doc's account. Tiplick declined to pay the remaining \$6,159.94. He also filed a claim with his insurer and received the policy limits of \$10,000, and he did not turn any of those funds over to Western Union.

On September 7, 2007, Western Union filed a lawsuit against Appellants, asserting that they were required to indemnify Western Union for the fraudulent transfers. Appellants filed a counterclaim alleging that Western Union was required to indemnify them for the fraudulent transfers. The parties filed cross-motions for summary judgment. Western Union relied on paragraph 12 of the Agency Agreement, which required Doc's to carry "Fidelity and/or Blanket Crime Insurance" in the amount of \$200,000. Appellants' App. at 55. Appellants relied on paragraph 9 of the Agreement, which required Western Union to indemnify Doc's for certain losses "caused by Western Union." *Id.* at 54. The trial court ruled in favor of Western Union and awarded it \$6,159.94 plus interest, attorney fees, and collection costs. Appellants now appeal.

Discussion and Decision

Our standard of review of a summary judgment is well settled:

When determining the propriety of an order granting summary judgment, we use the same standard of review as the trial court. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party.

Ryan v. Brown, 827 N.E.2d 112, 116-17 (Ind. Ct. App. 2005) (citations and quotation marks omitted). “[T]he fact that the parties have made cross-motions for summary judgment does not alter our standard of review. Rather, we consider each motion to determine whether the moving party is entitled to judgment as a matter of law.” *Blasko v. Menard, Inc.*, 831 N.E.2d 271, 273 (Ind. Ct. App. 2005) (citation omitted), *trans. denied*.

“Summary judgment is especially appropriate in the context of contract interpretation because the construction of a written contract is a question of law.” *TW Gen. Contracting Servs., Inc. v. First Farmers Bank & Trust*, 904 N.E.2d 1285, 1287-88 (Ind. Ct. App. 2009).

When the language of a written contract is not ambiguous, its meaning is a question of law for which summary judgment is particularly appropriate. In interpreting an unambiguous contract, we give effect to the intentions of the parties as expressed in the four corners of the instrument. Clear, plain, unambiguous terms are conclusive of that intent. We will neither construe clear and unambiguous provisions nor add provisions not agreed upon by the parties.

Kaghann’s Korner, Inc. v. Brown & Sons Fuel Co., 706 N.E.2d 556, 565 (Ind. Ct. App. 1999) (citations omitted), *clarified on reh’g on other grounds*. A contract is not ambiguous merely because the parties disagree as to its proper construction; rather, a contract will be

found to be ambiguous only if reasonable persons would differ as to the meaning of its terms. *Trs. of Indiana Univ. v. Cohen*, 910 N.E.2d 251, 257 (Ind. Ct. App. 2009). “We interpret a written contract by reading the contract as a whole, and we attempt to construe the language so as to not render any words, phrases, or terms ineffective or meaningless.” *DLZ Indiana, LLC v. Greene County*, 902 N.E.2d 323, 327 (Ind. Ct. App. 2009). “And, in reading the terms of a contract together, we keep in mind that the more specific terms control over any inconsistent general statements.” *Id.* at 328.

Appellants appear to have abandoned their argument based on paragraph 9 of the agency agreement.¹ At any rate, it appears that paragraph 12 is more specifically directed toward the situation in this case, where fraud was involved. Paragraph 12 provides:

Agent has obtained and will maintain the following insurance coverages, on forms of policies underwritten by companies acceptable to Western Union with limits no less than those specified: ... (iv) Fidelity and/or Blanket Crime Insurance: \$200,000 per location covering employee dishonesty, forgery, robbery, burglary, misplacement and similar occurrences. Each such policy shall name Western Union as an additional insured thereunder and shall prohibit cancellation without thirty (30) days’ prior notice to Western Union, and shall be primary and without right of contribution from any insurance maintained by Western Union. Western Union will have the right to collect directly under any applicable coverage for any deficiency in payment of

¹ Paragraph 9 states in relevant part:

Western Union will indemnify and hold Agent harmless from and against any claims, losses, damages, liabilities or expenses (including reasonable attorneys’ fees) arising out of or resulting from any mishandling, delay, non-delivery or other errors or omissions concerning the Services and caused by Western Union prior to transmission to Agent or after acceptance from Agent and not attributable to the acts or omissions of Agent, its officers, principals, or employees.

Appellants’ App. at 54. At oral argument before the trial court, Western Union argued that this provision applied to situations such as “if we sent the money to New Orleans and it was supposed to go to Tallahassee or anywhere else in the world and the money just wasn’t there because Western Union didn’t input the information properly.” Tr. at 19.

Western Union Funds to Western Union. The obligation of Agent to maintain insurance hereunder shall not relieve Agent of any of its other obligations hereunder, including those of indemnity.

Appellants' App. at 55.

Appellants make a two-part argument: (1) that the designated evidence supports a reasonable inference that an employee of Western Union was involved in perpetrating the fraud; and (2) paragraph 12 should not be interpreted to require Doc's to insure against fraud committed by employees of Western Union. Appellants focus on the words "employee dishonesty" and assert that it is unclear whether Doc's was required to insure against dishonesty of both companies' employees or only employees of Doc's. Appellants also argue that paragraph 12 should be interpreted to apply only to types of losses that are more within Doc's control than Western Union's.

We disagree. Paragraph 12 broadly describes the types of losses that Doc's was required to insure against, including "employee dishonesty, forgery, robbery, burglary, misplacement and similar occurrences." *Id.* The plain language of paragraph 12 required Doc's to insure against loss of funds through dishonest or illegal means, without reference to fault.² Had Doc's carried the amount of insurance required by the agreement, both Doc's and Western Union's losses would have been covered. Tiplick does not dispute that if Doc's is

liable for the loss that he is also liable pursuant to his personal guarantee. Therefore, we conclude that the trial court did not err by entering summary judgment for Western Union.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.

² Appellants' attempt to compare this case to *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 757 (Ind. Ct. App. 2002), is unavailing. In *Henthorne*, Legacy Healthcare hired Sunshine Rehab to provide therapy services to nursing facility residents. When a resident sued Legacy for negligence, Legacy sought indemnity from Sunshine based on an indemnity clause in their contract. We upheld summary judgment for Sunshine because the contract did not explicitly require Sunshine to indemnify Legacy for Legacy's own negligence. *Id.* at 757. We noted that such agreements are disfavored and therefore must be stated in clear and unequivocal terms. *Id.* In this case, however, we conclude that Doc's unambiguously agreed to carry insurance against the risk of losses occasioned by illegal activity regardless of fault. As Western Union notes, the point of having insurance was so that both parties could have their losses covered without regard to fault, as even the most careful business is unlikely to be able to completely prevent fraud.