Filed 10/31/17 Grandpa's Jumps v. Archdiocese of Los Angeles CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GRANDPA'S JUMPS, Cross-complainant and Appellant, v. ARCHDIOCESE OF LOS ANGELES, Cross-defendant and Respondent.	B276894 (Los Angeles County Super. Ct. No. BC477461)

APPEAL from an order of the Superior Court of Los Angeles County, Yvette M. Palazuelos, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Howard A. Slavin, Louis R. Di Stefano and Allison A. Arabian for Cross-complainant and Appellant.

Polsinelli, Daniel W. Bir, Mathew R. Groseclose and J. Alan Warfield for Cross-defendant and Respondent.

This is the second appeal in this case. In the first, we affirmed the judgment denying Grandpa's Jumps' contractual indemnity claim against the Archdiocese of Los Angeles (Archdiocese). Grandpa's Jumps now appeals a trial court order denying its motion for attorney fees. We affirm.

BACKGROUND

We summarize the facts as described in our earlier opinion (*Grandpa's Jumps v. Archdiocese of Los Angeles* (July 6, 2017, B265924) [nonpub. opn.]). The Archdiocese rented a 16-foot tall inflatable slide from Grandpa's Jumps for a "Fiesta" fundraiser at Santa Clara High School in Oxnard. At the time the Archdiocese tendered payment for the rental, it signed a rental contract with Grandpa's Jumps containing a general indemnity agreement.

At the fundraiser, a minor fell from the slide and fractured his skull, causing serious injury. The minor filed suit against Grandpa's Jumps and the Archdiocese (among other defendants), and Grandpa's Jumps and the Archdiocese settled with the minor. Grandpa's Jumps then filed a cross-complaint against the Archdiocese for express contractual indemnity, and the Archdiocese filed a cross-complaint alleging in part that it had no obligation to

indemnify Grandpa's Jumps. A jury found in a special verdict that Grandpa's Jumps was actively negligent with regard to the installation and use of the slide, and that its active negligence was a substantial factor contributing to the minor's injury. The trial court entered a judgment stating that the Archdiocese had no obligation to indemnify Grandpa's Jumps. Grandpa's Jumps appealed, and we affirmed, holding that the general indemnity clause did not entitle Grandpa's Jumps to indemnification for active negligence.

A month after the judgment, Grandpa's Jumps filed a motion for $168,577.50 in attorney fees and $29,074.16 in costs, arguing that the Archdiocese had a duty to defend Grandpa's Jumps (even though the trial court had rejected Grandpa's Jumps' indemnity claim), and was therefore required to reimburse Grandpa's Jumps for attorney fees and costs related to the cross-complaint. The trial court denied the motion, and Grandpa's Jumps filed this timely appeal.

DISCUSSION

Civil Code[1] section 2778 provides: "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears." Subdivision (3) states: "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands,

---

[1] All further statutory references are to the Civil Code.

or liability incurred in good faith, and in the exercise of a reasonable discretion." Subdivision (4) states: "The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so."

Section 2778 states that an indemnity against claims includes the cost of a defense, and that the person indemnifying has a duty to defend the person indemnified. The problem for Grandpa's Jumps is that the trial court denied the indemnity claim and we affirmed that denial. As a result, no indemnity exists that "embraces the costs of defense" (subd. 3), and Grandpa's Jumps is not a "person indemnified," nor is the Archdiocese a "person indemnifying," as described in subdivision (4).

We therefore examine the agreement and the indemnity clause to see whether "a contrary intention appears" (§ 2778), giving Grandpa's Jumps the right to recover its attorney fees and costs under the indemnity clause even when, as here, Grandpa's Jumps is not entitled to indemnity. We conclude that no such intention exists.

The indemnity clause in the agreement states: "Lessee agrees to indemnify and hold lessor harmless from any and all claims, actions, suits, proceedings, costs, expenses, damages, and liability, including attorney fees, fines, and penalties arising out of, connected with, or resulting from the equipment or its use or the personnel provided

hereunder including without limitation, the manufactures [sic] selection, delivery, possession, use operation, conduct or return of said equipment. Lessee agrees not to hold lessor responsible for any unfavorable weather condition, i.e., high winds exceeding 25 mph, rain, or other unexpected conditions that may arise. No refund." The two-page agreement does not contain a express promise that the lessee (the Archdiocese) has a duty to defend any suit or action brought against Grandpa's Jumps.

In *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541 (*Crawford*), the construction contract contained an indemnity clause similar to the clause in this contract, in which Weather Shield (who contracted to manufacture and supply wood-framed windows) promised " 'to indemnify and save [the project developer] harmless against all claims for damages . . . loss, . . . and/or theft . . . growing out of the execution of [Weather Shield's] work.' " Unlike the contract here, however, the contract in *Crawford* also provided that Weather Shield promised " 'at [its] own expense to *defend any suit or action* brought against [the developer] *founded upon* the claim of such damage[,] . . . loss or theft.' " (*Id.* at pp. 547–548.) A lawsuit filed by homeowners against Weather Shield, the project developer, and the subcontractor who installed the windows alleged that the windows supplied by Weather Shield were improperly designed, manufactured, and installed. The developer settled before a trial after which the jury found that Weather Shield was not negligent. The developer then cross-complained against

Weather Shield, seeking indemnity under the indemnity clause for the amounts it paid to the homeowners in settlement, and under the duty-to-defend provisions, attorney fees and expenses. The trial court ruled that Weather Shield was obliged to indemnify the developer only if Weather Shield was negligent, and the jury verdict that Weather Shield was not negligent absolved Weather Shield of indemnity liability. Nevertheless, the contract made Weather Shield responsible for the developer's defense regardless of whether Weather Shield was negligent. The trial court found Weather Shield liable for its portion of the attorney fees that the developer incurred in the original lawsuit, and for the fees that the developer incurred in prosecuting the cross-complaint. (*Id.* at pp. 548–549.)

Weather Shield appealed the judgment requiring it to reimburse the developer's attorney fees (the developer did not appeal the order absolving Weather Shield of contractual indemnity liability). (*Crawford*, *supra*, 44 Cal.4th at p. 550.) The court of appeal affirmed, holding that Weather Shield's "promise 'to defend' " the developer against suits meant it had an immediate duty to provide a defense the moment the lawsuit was brought, and the duty to defend could not depend on the outcome of the issues in the suit. (*Ibid.*) The Supreme Court granted review on the issue whether a contract under which a subcontractor "agreed 'to defend any suit or action' against a developer 'founded upon' any claim 'growing out of the execution of the work' require[s] the subcontractor to provide a defense to a suit against the

developer even if the subcontractor was not negligent." (*Id.* at p. 551.) The Court noted that not only did the contract "explicitly obligate[] Weather Shield both to *indemnify* [the developer] against certain claims, and 'at [its] own expense to *defend*' [the developer] against 'any suit or action . . . founded upon' such claims," it also "included a further express indication that the express duty 'to defend' actions against [the developer] was not strictly limited to those claims on which, in the end, Weather Shield actually owed indemnity." (*Id.* at p. 558.) Because the contract specifically provided that Weather Shield had a "duty 'to defend' [the developer] against claims 'founded upon' damage or loss caused by Weather Shield's negligent performance of its work," Weather Shield had a duty to defend the developer as soon as the suit was filed, regardless of whether Weather Shield was negligent (and therefore was required to indemnify). (*Id.* at p. 568.)

Crawford, *supra*, 44 Cal.4th 541 addressed the duty to defend where a provision in the contract (separate from the indemnity clause) explicitly provided that Weather Shield would defend the other party against any claim. The trial court had concluded that Weather Shield had no duty to indemnify because it had not been negligent, and the parties accepted that interpretation of the contract. (*Id.* at p. 547.) *Crawford* does not control this case, in which there is no separate agreement to defend. As the court pointed out, the duty to indemnify is different from the duty to defend. A contract including an indemnity clause "may require one

party to *indemnify* the other, under specified circumstances, for moneys paid or expenses incurred . . . as a result of [third party] claims," while a contract including a specific promise to defend "assign[s] one party . . . responsibility for the other's *legal defense* when a third party claim is made." (*Id.* at p. 551.) "Depending on the contractual language, a duty to defend may exist even if no duty to indemnify is ultimately found." (*Aluma Systems Concrete Construction of California v. Nibbi Bros. Inc.* (2016) 2 Cal.App.5th 620, 627, citing *Crawford*, *supra*, 44 Cal.4th 541.) "The duty to defend 'necessarily arises as soon as [the specified] claims are made against the promisee.'. . . . Unlike the duty to defend, however, the duty to indemnify does not arise until liability is proven." (*Id.* at p. 627.)

"The parties are free to agree to a broader duty to defend; that is, the parties can agree that a defense will be provided even in situations where the facts alleged would not give rise to a claim of indemnity." (*City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 249 (*City of Bell*).) The contract here contained no separate language establishing a broader duty to defend, and the Archdiocese therefore did not have a separate duty to assume Grandpa's Jumps' defense from the outset and without regard for the outcome. Instead, we address only whether the Archdiocese had the narrower duty, *under the indemnification clause*, to defend Grandpa's Jumps and/or to repay Grandpa's Jumps for the attorney fees and costs it incurred in this lawsuit,

which arose out of a third party claim long after the minor's claim was settled.

We therefore return to section 2778. As *Crawford*, *supra*, 44 Cal.4th 541 explained, the statute in subdivision (4) "places in every indemnity contract, unless the agreement provides otherwise, a duty to assume the indemnitee's defense, if tendered, against all claims 'embraced by the indemnity.' The indemnitor's failure to assume the duty to defend the indemnitee upon request (§ 2778, subd. (4)) may give rise to damages in the form of reimbursement of defense costs the indemnitee was thereby forced to incur. But this duty is nonetheless distinct and separate from the contractual obligation to pay an indemnitee's defense costs, after the fact, as part of any indemnity owed under the agreement. ([§ 2778], subd. 3.)" (*Id.* at pp. 557–558.) The implied duty to defend which subdivision (4) of the statute places in every indemnity clause applies only to "the matters embraced by the indemnity." (§ 2778, subd. (4).) Our earlier opinion affirmed the trial court's conclusion that Grandpa's Jumps' active negligence was not "embraced by the indemnity" clause in the contract, and so subdivision (4)'s implied duty to defend does not obligate the Archdiocese to reimburse Grandpa's Jumps for its attorney fees and costs related to that active negligence. "[I]f an action is brought against the indemnitee which is *not* 'embraced by the indemnity' duty, there is no duty to defend." (*City of Bell*, *supra*, 220 Cal.App.4th at p. 249.)

DISPOSITION

The order is affirmed. The Archdiocese of Los Angeles is awarded costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.