

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 462-9-17 Rdev

DRAKE HULL,
Plaintiff,

v.

CITY OF RUTLAND, VERMONT,
RUTLAND REGIONAL FIELDHOUSE,
INC, and COUNTRYSIDE GLASS
CORPORATION,
Defendants

FILED

AUG 25 2020

VERMONT SUPERIOR COURT
RUTLAND

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (Motions ## 7-9)

I. Introduction

This is an action to recover damages for personal injuries that Plaintiff Drake Hull allegedly sustained on March 24, 2007, at the "Rutland Regional Fieldhouse" in Rutland, Vermont. The Fieldhouse was owned at the time by Defendant Rutland Regional Fieldhouse, Inc. ("RRF"), and RRF had leased portions of the Fieldhouse to Defendant City of Rutland pursuant to a written "Facility Lease Agreement." At the time of his alleged injury, Hull was attending an in-door youth soccer game organized by the City Parks and Recreation Department. He was ten years old.

Hull alleges that he was severely injured when a stack of polyethylene sheets fell on him as he was retrieving a soccer ball. His suit alleges that RRF, the City and/or Countryside Glass Corporation were negligent in storing the sheets in a location to which the public had access and in a manner which made them unstable and liable to topple over, and in failing to warn members of the public about the danger posed by the stack of polyethylene sheets. Each Defendant denies liability for Hull's injuries, and two of the Defendants (RRF and the City) have asserted crossclaims against each other seeking indemnity pursuant to express indemnity provisions contained in their Lease Agreement.

Presently before the court are cross-motions for summary judgment filed by RRF and the City. RRF contends that it is entitled to indemnity and defense costs from the City pursuant to either or both of two express indemnity provisions

contained in the Lease. The City opposes RRF's motion and contends that it is entitled to indemnity and defense costs from RRF pursuant to a third express indemnity provision contained in the Lease.¹

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "[S]ummary judgment is required when, after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [his or] her case and upon which [he or] she has the burden of proof." Gallipo v. City of Rutland, 2005 VT 83, ¶ 13, 178 Vt. 244 (citations and internal quotation marks omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. Carr v. Peerless Insurance Co., 168 Vt. 465, 476, 724 A.2d 454 (1998). However, a non-moving party cannot rely on unsupported generalities or speculation to defeat a properly-supported motion for summary judgment. See V.R.C.P. 56 (c), (e).

Conclusory allegations without facts to support them do not preclude the entry of summary judgment. Robertson v. Mylan Laboratories, Inc., 2004 VT 15, ¶15, 176 Vt. 356; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("If the evidence is merely colorable, . . . or is not significantly probative, . . . , summary judgment may be granted.") (citations omitted). An opposing party's allegations must be supported by affidavits or other documentary materials which show specific facts sufficient to justify submitting that party's claims to a factfinder. See Robertson, 2004 VT 15, ¶15; Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25, 676 A.2d 774 (1996).

The court heard oral argument on the motions on July 9, 2020. Based upon the parties' submissions, arguments and contentions, the court finds no material factual issues in dispute. For the reasons set forth below, RRF's Motion for Summary Judgment is *denied* and the City's Motion for Summary Judgment is *granted*.

II. The Undisputed Facts

At the time of Hull's alleged injury, RRF owned and operated the Rutland Regional Fieldhouse at 100 Diamond Run Place in Rutland, Vermont. The Fieldhouse contained front access doors, a lobby area, bathrooms, locker rooms, a

¹ The City has also asserted a crossclaim for indemnity against Defendant Countryside Glass Corporation, but that indemnity claim is not based upon any express provision of the Lease, and it is not part of the motions presently pending before the court. Therefore, the court will not address the City's indemnity claim against Countryside Glass in this Ruling.

turf area, a spectator area, benches, bleachers, administrative offices, meeting spaces, utility spaces, storage spaces and a timing booth, among other things.

On March 10, 2006, RRF and the City had entered into a "Facility Lease Agreement" (Exhibit 4) under which the City leased portions of the Fieldhouse for use in connection with the City Parks and Recreation Department's in-door spring youth soccer program. The Lease was negotiated and signed by Gunther Sihler on behalf of RRF and EJay Bishop on behalf of the City. It contained two parts: the first six pages, which were prepared mainly by Sihler, consisted of RRF's standard lease form applicable to all lessees; and an Appendix A, prepared by Bishop with the assistance of Rutland City Attorney Henry Brislin, Esq., which set forth provisions specific to this particular agreement.²

The standard lease form contained the following applicable provisions:

Facility Lease Agreement

The Rutland Regional Field House, Inc., with offices at 100 Diamond Run Place, Rutland, Vermont, 05701, (the "Lessor,") by this Agreement leases to City of Rutland, Vermont (the "Lessee",) the Field House and associated facilities located at 100 Diamond Run Place, Rutland, Vermont, but excluding the administrative offices, meeting, utility, storage, or other spaces at the facility unless specifically included in this Lease Agreement (the 'Leased Premises"), on the following terms and conditions.

Technical Director

During the Lease Term, the Field House Technical Director must be on site to provide technical assistance and oversight of Lessees activity unless specifically agreed to in writing. A fee of \$N/A per hour for the services of the Technical Director shall be due from the Lessee, in addition to the rent, and paid in full when the rent is due under this Lease Agreement.

² There was also an Appendix B, which spelled out the schedule of dates and times during which the City would have access to the Fieldhouse and the amounts of rent to be paid, among other things. Appendix B is not relevant to the indemnity claims at issue in this Ruling.

No Alterations or Improvements To Leased Premises

The Lessee shall make no changes, alterations or improvements to the Leased Premises without the express prior written consent of the Lessor....

Lessee is Responsible for Crowd Control

The Lessee shall be responsible for the safety and conduct [of] all Lessee guests, personnel, subcontractors, and other persons, who are at or near the Leased Premises during the Lease Term. The Lessee shall implement adequate crowd control and security measures to assure that the use and occupancy of the Lease Premises are orderly, polite, and pleasant for all persons present at the Leased Premises during the Lease Term.

Lessee Shall Indemnify Lessor

Lessee shall indemnify and hold harmless the Lessor and its officers, directors, employees, and agents from any and all liability, claims, loss, costs, damages, taxes, or expenses, including reasonable attorney's fees and court costs, related to personal injury, property damage, copyright infringement, tax assessment, or otherwise, attributable to an act or failure to act or activity, whether intentional or unintentional, of the Lessee, its agents, or its guests during the Lease Term.

Attorney's Fees

Should any dispute arise between the parties to this Lease Agreement, or their successors, the substantially prevailing party shall be entitled to, in addition to such other relief as may be granted, reasonable attorney's fees and court costs.

(Exhibit 4, pp. 1-2, 4-5).

Appendix A to the Lease contained the following additional applicable provisions:

1. Fieldhouse agrees to rent to City "turf time" in Fieldhouse during a period from approximately mid-March to the end of April each year in a projected amount of four hundred forty (440) hours. The exact details are attached hereto as Appendix "B"....

7. Fieldhouse agrees to provide access for City, its employees and all participants, during the term of the rental time of this agreement. Said access will include up to one half hour before the start of any scheduled programs, activities or events.
8. Fieldhouse agrees to provide appropriate turf, one set of properly fixed soccer goals and their existing wall mounted timing device during the hours agreed upon in Appendix "B".
9. Fieldhouse also agrees to provide a storage area that can be locked for City equipment needed for any scheduled programs, activities or events.
10. Fieldhouse will indemnify and hold the City harmless for any and all claims for injuries or claims for other reason occasioned as a result of the use of the property totally under the control of Fieldhouse. Fieldhouse will have the City added as an additional named insured on its insurance for the time period of the use by City of the premises.
11. City agrees to indemnify and hold Fieldhouse harmless from any and all claims for injuries or other claims as a result of the activities of the City on the premises of Fieldhouse. City will maintain Fieldhouse as an additional named insured on its insurance policies for the time provided for in the term of this agreement.
12. City is administering its programs and therefore has full and total responsibility for the administration of those programs and for the use of Fieldhouse during this time.
13. City will have the exclusive use of the Fieldhouse for the times provided in Appendix "B" attached hereto. If there are events already scheduled during the time leased to City, Fieldhouse will notify City of Rutland and receive its written agreement to allow those. The Fieldhouse anticipates and agrees that in the remaining two years of this agreement that the facility will be reserved for the City's exclusive use during the times as provided in Appendix "B".

(Id., Appendix A, ¶¶ 1, 7-13).

On March 24, 2007, ten-year-old Drake Hull of Clarendon, Vermont, was present at the Rutland Regional Fieldhouse to participate in a youth soccer game organized by the Rutland City Parks and Recreation Department. Hull and his teammates gathered in an area behind the player benches and waited for the previous soccer game to finish. While waiting there, a soccer ball rolled away, and Hull went to retrieve it. The ball ultimately came to rest behind the goal/net area. After retrieving the ball, as he began walking back towards his teammates, Hull

was struck by a number of falling polyethylene sheets that had been left leaning upright against the wall.³ The sheets had been purchased by RRF and had been put there when delivered by Countryside Glass Corporation. The area where Hull's injury occurred was not blocked or cordoned off, and there were no warning signs prohibiting players or spectators from accessing that area or warning of the danger posed by the stack of polyethylene sheets.

During games at the Fieldhouse, balls and other sports equipment occasionally ended up in or around the area where Hull was stuck by the plastic materials. RRF expected that employees and/or representatives of the City would retrieve this equipment from the area.

III. Discussion

As noted earlier, RRF contends that two express provisions of the Lease require the City to indemnify it from Hull's suit. The first provision, entitled "Lessee Shall Indemnify Lessor," provides that "Lessee shall indemnify and hold harmless the Lessor ... from any and all liability, claims, loss, costs, damages ... or expenses ... related to personal injury ... attributable to an act or failure to act or activity ... of the Lessee, its agents, or its guests during the Lease Term." The second provision, found in ¶ 11 of Appendix A, states that "City agrees to indemnify and hold Fieldhouse harmless from any and all claims for injuries or other claims as a result of the activities of the City on the premises of Fieldhouse." RRF contends that it is entitled to judgment on its crossclaim against the City because it is undisputed that, on the date of Hull's alleged injury, (1) Hull was at the Fieldhouse to participate in a City-organized soccer game, and (2) the City was responsible for supervising the event and ensuring the safety and conduct of all players, spectators, and other invitees at the event.

RRF further contends that the City is not entitled to indemnity under ¶ 10 of Appendix A, because it is undisputed that Hull's accident occurred in an area of the Fieldhouse leased to, and under the control of the City. As noted earlier, that provision of the Lease states that "Fieldhouse will indemnify and hold the City harmless for any and all claims for injuries ... occasioned as a result of the use of the property totally under the control of Fieldhouse."

The City rejects RRF's contention that Hull's injury occurred in an area leased to or under the control of the City. The City contends that it is entitled to indemnification from RRF pursuant to ¶ 10 of Appendix A because Hull's alleged

³ At his deposition, Hull marked a photograph with: a circle designating the area where he and his teammates gathered and waited; a triangle designating where he went to retrieve the soccer ball; and a square designating the area where he was injured by the falling stack of plastic sheets.

injuries were caused by polyethylene sheets that were purchased, located, positioned and stored solely by RRF. Therefore, the City concludes, Hull's injuries were the result of a "use of the property totally under the control of Fieldhouse." The City further contends the RRF is not entitled to indemnity under the "Lessee Shall Indemnify Lessor" provision of the Lease, or under ¶ 11 of Appendix A, because Hull's alleged injury was neither "attributable to an act or failure to act or activity... of the [City]" nor "a result of the activities of the City on the premises...."

A contract is interpreted to give effect to the parties' intent, which is reflected in the contractual language, if that language is clear. R&G Properties, Inc. v. Column Financial, Inc., 2008 VT 113, ¶ 17, 184 Vt. 494. A court may consider extrinsic evidence "if the contract terms are ambiguous." B&C Management Vermont, Inc. v. John, 2015 VT 61, ¶ 11, 199 Vt. 202.

Here, the contract terms are unambiguous, and the intent of the parties is clear from the language that they used. The court does not need to determine which of the parties had control of the location where the alleged injury took place because, under the Lease, in deciding who must indemnify whom, it does not matter where the injury took place. Under all three of the express indemnity provisions of the Lease, the duty to indemnify is imposed upon the party whose use or activity caused the injury in question.

Thus, in the "Lessee Shall Indemnify Lessor" provision of the Lease, the City must indemnify and hold RRF harmless only for "personal injury ... attributable to *an act or failure to act or activity* ... of the Lessee, its agents, or its guests during the Lease Term." Similarly, under ¶ 11 of Appendix A, the City must indemnify and hold RRF harmless only for "injuries ... as a result of *activities* of the City on the premises...." And, most significantly, this is also true under ¶ 10 of Appendix A, which provides that RRF must indemnify and hold the City harmless from "injuries ... occasioned as a result of *the use* of the property totally under the control of Fieldhouse." In other words, if Hull's alleged injury was the result of an act, omission or activity of the City, then the City must indemnify RRF, but if the alleged injury was the result of a *use* totally under RRF's control, then RRF must indemnify the City.

It is undisputed that Hull's alleged injury was caused by the polyethylene sheets falling on him as he retrieved a soccer ball at the Fieldhouse on March 24, 2007. It is also undisputed that the polyethylene sheets were owned by RRF and that RRF had left them leaning upright against the wall that day, without any warning to the public to stay away from the sheets or about the danger that they posed. The decision to store those sheets in such a manner that day was a *use* of the Fieldhouse that was *totally* under RRF's control. Therefore, the City is entitled to

be indemnified and held harmless from any liability it may incur in this case on account of Hull's alleged injury.

It is true that Hull was at the Fieldhouse that day for the purpose of participating in a City-sponsored youth soccer game. It is also true that under the Lease it was the City, not RRF, who had the responsibility for the safety and conduct of the City's guests and participants. However, there is no evidence or claim that Hull's alleged injury was attributable to any act, omission or activity on the part of the City. Hull would not have been at the Fieldhouse that day, had it not been for the City-sponsored game, but his mere presence there that day was not what caused him to be injured. The immediate, proximate cause of Hull's alleged injury was RRF's choice to *use* the Fieldhouse as the place to store its polyethylene sheets that day.

If RRF had wanted the City to indemnify it for any injury sustained by a person present at the Fieldhouse for a City-sponsored event, no matter how or where on the property the injury occurred, RRF could have insisted that the contract say that, but it does not. *C.f.*, Southwick v. City of Rutland, 2011 VT 53, 190 Vt. 106; Hamelin v. Simpson Paper (Vermont) Co., 167 Vt. 17 (1997).

IV. Conclusion

For all the foregoing reasons, RRF's motion for summary judgment is *denied* and the City's motion for summary judgment is *granted*.

SO ORDERED this 24th day of August, 2020.



Robert A. Mello
Superior Judge