

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

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SHARON MILLER, Special Administrator of)
the Estate of DEPARIS MILLER, deceased,)
)
Plaintiff,)
)
v.)
)
WHITE CASTLE SYSTEM, INC.,)
)
Defendant.)
-----)
WHITE CASTLE SYSTEM, INC.,)
)
Third-Party Plaintiff,)
)
v.)
)
WESTEC INTERACTIVE SECURITY, INC.,)
)
Third-Party Defendant.)

No. 07 L 004632

**WHITE CASTLE'S RESPONSE TO WESTEC'S PARTIAL MOTION FOR SUMMARY
JUDGMENT ON COUNTS I - IV, VI OF WHITE CASTLE'S SECOND AMENDED
THIRD PARTY COMPLAINT AND WESTEC'S MOTION FOR SUMMARY
JUDGMENT ON COUNT V OF WHITE CASTLE'S SECOND AMENDED THIRD
PARTY COMPLAINT**

NOW COMES the Defendant/Third-Party Plaintiff, White Castle System, Inc. ("White Castle"), by and through its Attorneys, and for its Response Brief in opposition of Westec Interactive Security Inc.'s ("Westec") Partial Motion for Summary Judgment on Counts I-IV and VI of White Castle's Second Amended Third Party Complaint and Motion for Summary Judgment on Count V of White Castle's Second Amended Third-Party Complaint, states as follows:

INTRODUCTION AND PROCEDURAL BACKGROUND

As the direct defendant under a claim of wrongful death based on premises liability, White Castle filed a Third Party Complaint based in contribution against its security company, Westec. The Third Party Complaint contained counts for: (1) contribution, (2) negligent supervision, (2) negligent training, (4) breach of contract, and (5) implied indemnity.¹ White Castle's Third Party Complaint seeks contribution for Westec's proportionate share of its own negligence to the damages ultimately recoverable for the personal injuries to a third party, DeParis Miller.

At the time of the initial filing of the Third Party Complaint, Westec moved to dismiss all counts of White Castle's Third Party Complaint. In attacking the same counts subject to Westec's current Partial Summary Judgment Motion, Westec argued in its Motion to Dismiss that any recoverable damages should be limited pursuant to Sections 7.1 and 7.2 of the security services contract between White Castle and Westec. (A copy of Westec's August 25, 2008 Motion to Dismiss is attached as Exhibit A.) This is the exact same argument Westec makes in its present Partial Summary Judgment Motion and the exact same argument this Court denied on November 25, 2008 when ruling on Westec's Motion to Dismiss. The Court explained in its November 25th Memorandum that the contract between Westec and White Castle is irrelevant to third party claims and the determination of Westec's contribution to the underlying plaintiff, DeParis Miller's, injuries. (A copy of the November 25, 2008 Memorandum and Order is attached hereto as Exhibit B.)

After new information was learned through discovery, White Castle sought to amend its Third Party Complaint to add a count for Spoliation of Evidence. The prior counts of the Third

¹ A sixth count for Spoliation of Evidence was subsequently added.

Party Complaint were re-alleged and unchanged from the initial filing. Westec attempted to use White Castle's addition of a sixth count to make another attack on the unaltered counts of White Castle's Third Party Complaint. This time Westec moved to dismiss White Castle's Indemnity Count making the same argument it currently makes now in its Motion for Summary Judgment as to Count V. (A Copy of Westec's January 6, 2010 Motion to Dismiss is Attached as Exhibit C.) Again, this Court denied Westec's second attempt to dismiss White Castle's Indemnity Count, Count V. (A Copy of the January 26, 2010 Court Order is Attached as Exhibit D.)

The fact of the matter is, Westec cannot take advantage of a new judge, due to being on the trial call, and make the same arguments it has lost before. Westec's prior arguments in its Motions to Dismiss were legally founded and no new facts were revealed through discovery which provides any support to Westec's Motion for Partial Summary Judgment on Counts I-IV and VI and Westec's Motion for Summary Judgment on Count V. Beyond Westec's inappropriate attempt to get another bite at the apple, White Castle and Westec play different roles in this litigation and, therefore, are subject to different liabilities. As such, damages for White Castle's claims against Westec seek only recovery for Westec's pro rata share of liability towards the injuries of a third party, who is not a party to the contract. As previously held in this matter, recovery for third party claims such as this are not those subject to Sections 7.1 and 7.2 and such limitation is in direct contradiction with other sections of the contract. (See Exhibit B.) Therefore, Westec's damages are question of material fact to be determined at trial. Accordingly, Westec's Motion for Partial Summary Judgment as to Counts I-IV and VI and its Motion for Summary Judgment to Count V should be denied.

LEGAL STANDARD

Under Illinois Rules of Civil Procedure, Section 5/2-1005, summary judgment should only be granted when “there is no genuine issue as to any material fact.” In determining whether a material fact exists, the pleadings, depositions and admissions must be construed strictly against the movant and liberally in favor of the opponent. *Adames, Jr., v. Sheahan*, 233 Ill.2d 276, 295-96 (2009). A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences. *Id.* Summary Judgment should only be granted when the right of the moving party is clear and free from doubt. *Id.*

Exculpatory or limitation of damages clauses, such as Sections 7.1 and 7.2 relied upon by Westec, are not favored and must be strictly construed against a benefiting party. *Jewelers Mutual Ins. Co. v. Firststar Bank Illinois*, 341 Ill.App.3d 14, 19 (1st Dist. 2003). The language of such clauses should be clear, explicit and unequivocal. *Id.* Ambiguity in a contract may be construed against the drafter, in this case, Westec. *Id.* at 18.

ARGUMENT

I. WESTEC’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I-IV and VI SHOULD BE DENIED BECAUSE WESTEC’S DAMAGES ARE A QUESTION OF FACT AND NOT CONTROLLED BY THE CONTRACT

The scope of all Counts of White Castle’s Second Amended Third-Party Complaint against Westec is founded upon Westec’s own negligence and the contribution of Westec’s negligence to the personal injuries suffered by DeParis Miller. It is well established that DeParis Miller is not a party to the contract between White Castle and Westec, therefore, the duty owed by Westec to DeParis Miller and recoverable damages for breach of that duty are beyond the terms of the Contract. *See American Centennial Insurance Co. v. Wells Fargo Alarm Services,*

152 Ill.App.3d 503 (1st Dist. 1986). (An exculpatory clause does not relieve an alarm company of its duty of reasonable care to injured persons not party to the contract.) Therefore, the exculpatory clause found in Sections 7.1 and 7.2 of the Contract which forms the basis of Westec's Partial Motion for Summary Judgment is inapplicable in this matter.

More importantly, this Court has previously held that Sections 7.1 and 7.2 of the Contract are irrelevant to Westec's liability and damages. Westec made this same argument in its prior Motion to Dismiss White Castle's initial Third Party Complaint. (See Exhibit A.) In denying Westec's motion, this Court expressly stated in its November 25, 2008 memorandum, by citing, in part, Judge Hibbler's order in *Wilder v. White Castle*, Court No. 07-CV-4491: "**Sections 7.1 and 7.2 do not bar White Castle's third-party claims**... 'Paragraphs 7.1., 7.2 and 10 govern claims that White Castle might bring against Westec for damages it suffered because of Westec's breach of contract or negligence, but are not relevant to the issue of whether Westec contributed to Wilder's injury.' While Westec is named solely as a third-party contribution defendant in this complaint, Judge Hibbler's order still applies." (See Exhibit B.) Nothing factually has been discovered which would change the court's prior rulings or support Westec's Motion for Partial Summary Judgment.² Despite differences in standards of review, Westec's Motion for Partial Summary Judgment provides no new facts, nor have any been revealed during discovery, which alters the same legal argument Westec made in its prior Motion to Dismiss. Because it has previously been held that section 7.1 and 7.2 are inapplicable to the claims asserted by White Castle against Westec, Westec's damages are, therefore, a question of material fact and the extent of Westec's damages are to be determined at trial.

² Plaintiff's subsequent addition of a Spoliation of Evidence Claim directly against Westec does not change the nature of Westec's liability in this matter. Regardless of Plaintiff's Spoliation of Evidence claim, Westec remains liable only for its own negligence ultimately recoverable to Plaintiff.

Furthermore, Westec conveniently ignores to include the provision within the Contract that directly negates Westec's argument and expressly identifies Westec's responsibility to Third Party Claims. Section 8 of the Contract states:

“Customer [White Castle] is and shall be responsible for all third party claims arising out of or related to operation of, or acts or event occurring on or with respect to, each site where a System is located **except that WIS [Westec] shall be responsible for any such claims to the extent that they are directly related to WIS's [Westec's] operation of the System or provision of the Services.**” (emphasis added.)

Contrary to the sections relied upon by Westec in its current Motion, Section 8 does not limit the amount of recoverable damages for third party claims. White Castle's Second Amended Third-Party Complaint against Westec is just that – a third party claim – and only seeks recovery for Westec's own negligence which resulted in injuries to a third party. As such, Section 8, rather than Section 7.1 and/or Section 7.2 of the Contract, likely controls this instant matter and, therefore, the amount of damages Westec may be liable is a question of fact to be determined at trial. Moreover, the contradictory language between Section 8 and Sections 7.1 and 7.2 evidence that Sections 7.1 and 7.2 are not clear and are not explicit as required for enforcement of exculpatory clauses. Accordingly Westec's Motion for Partial Summary Judgment should be denied.

In addition, Westec fails to provide any supportive and controlling case law which applies similar exculpatory clauses found in Sections 7.1 and 7.2 to third party claims. All three cases discussed by Westec, examined contractual provisions limiting liability to cases where the plaintiff store owner, and party to the underlying contract, was burglarized or damaged and only economic damages resulted. See, *Pick Fisheries, Inc. v. Burns Electronic Security Services, Inc.*, 35 Ill.App.3d 467 (1st Dist. 1976), *Purolator Security Inc. v. Wells Fargo Alarm Service*, 141 Ill.App.3d 1106 (1st Dist. 1986), *North River Ins. Co. v. Jones*, 275 Ill.App.3d 175 (1st Dist.

1995), *Chicago Steel Rule and Die Fabricators Co. v. ADT Security Systems Inc.*, 327 Ill.App.3d 642 (1st Dist). None of these cases discussed the applicability of a contractual provision limiting liability and damages to a third party claim for personal injuries, which are the facts present in the instant matter. Accordingly, the Contract between Westec and White Castle does not limit third party claims for personal injuries and does not prevent Westec from its duty of reasonable care to DeParis Miller.

II. WESTEC'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT V SHOULD BE DENIED

Westec has attempted, and failed to dismiss Count V of White Castle's Third Party Complaint twice before. White Castle should not get another bite at the apple. Not only was Westec denied its attempt to dismiss the Indemnity Count when it first moved to dismiss White Castle's initial Third Party Complaint, the Court rejected Westec's second attempt to dismiss White Castle's Indemnity Count based on the exact same argument it makes in its current Motion for Summary Judgment. (See Exhibits A – D.) In denying Westec's second attempt to dismiss the Indemnity Count, the Court explained on January 26, 2010, that the Indemnity Count in the Amended Third Party Complaint is substantially the same as the Indemnity Count of the initial Third Party Complaint and, therefore, the Court's prior denial of Westec's Motion to Dismiss shall remain and White Castle's Indemnity Count shall stand. The discovery conducted subsequent to Westec's Motions to Dismiss did not produce any factual evidence to support Westec's current Motion for Summary Judgment. In actuality, Westec's current Motion for Summary Judgment is simply a reiteration of the same legal argument previously asserted and denied before. Again, Westec should not be allowed to take advantage of a new judge and re-litigate the same issues it brought before, and, therefore, its Motion for Summary Judgment as to Count V should be denied.

CONCLUSION

WHEREFORE, Defendant/Third-Party Plaintiff, White Castle System Inc., prays this Court deny Westec's Partial Motion for Summary Judgment as to Counts I-IV and VI and Motion for Summary Judgment as to Count V and any other relief sought by Westec.

Respectfully submitted,