SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1367-20

ANDREA VLADICHAK,

Plaintiff-Respondent,

v.

MOUNTAIN CREEK SKI RESORT, INC.,

Defendant-Appellant,

and

MICHAEL LAVIN,

Defendant-Respondent.

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Argued April 4, 2022 – Decided April 13, 2022

Before Judges Fasciale and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0590-18.

Samuel J. McNulty argued the cause for appellant (Hueston McNulty, PC, attorneys; Samuel J. McNulty, of counsel and on the briefs; Edward J. Turro, on the briefs).

Matthew E. Kennedy argued the cause for respondent Michael Lavin (Leary Bride Mergner & Bongiovanni, PA, attorneys; Matthew E. Kennedy, of counsel and on the brief).

PER CURIAM

Defendant Snow Creek, LLC d/b/a Mountain Creek Resort, Inc. (Mountain Creek) appeals from a November 9, 2020 order denying its motion for summary judgment and granting summary judgment to defendant Michael Lavin (Lavin) dismissing Mountain Creek's cross-claims for defense costs and contractual indemnification. Judge David J. Weaver (motion judge) concluded in a thorough opinion that the contractual language was ambiguous and therefore Mountain Creek was not entitled to indemnification from Lavin or defense costs incurred to defend plaintiff's allegations that Mountain Creek itself was negligent. We affirm.

On December 21, 2017, plaintiff sustained personal injuries while skiing at a ski area owned and operated by Mountain Creek in Vernon Township, New Jersey. Plaintiff was struck from behind by Lavin, another skier. Plaintiff filed a complaint alleging Mountain Creek and Lavin were negligent. Plaintiff's complaint alleged Mountain Creek was independently negligent for failing to provide appropriate warnings to skiers, failing to appropriately designate the

difficulty of ski trails, failing to provide skiers with appropriate information about trail conditions, failing to timely remove obvious manmade hazards, and/or otherwise failing to establish adequate procedures to provide a safe skiing environment. The complaint alleged Lavin was negligent for breaching his duty to others to ski in a reasonably safe manner by skiing in a reckless manner and/or intentionally colliding into plaintiff and causing her injuries.

Prior to the incident, Lavin signed an equipment rental agreement (Rental Agreement) and lift ticket agreement (Release Agreement) in which he agreed to defend and indemnify Mountain Creek from any claims related to his own conduct and use of the property's equipment facilities. On August 7, 2019, Mountain Creek filed an answer and cross-claims seeking defense and indemnification from Lavin based on the executed Rental and Release Agreements. Mountain Creek previously tendered the defense to Lavin on July 16, 2019.

Plaintiff's counsel served a report from plaintiff's liability expert, who concluded that Lavin violated the New Jersey Ski Statute, N.J.S.A. 5:13-1 to -12, and the Skier's Responsibility Code by failing to control his speed and course and by failing to yield to the skiers ahead of him. The expert opined that Lavin's reckless conduct caused the accident. On March 27, 2020, Judge Stephan C.

Hansbury entered an order granting Mountain Creek's motion for summary judgment dismissing plaintiff's claims that Mountain Creek was negligent. Lavin and plaintiff settled and filed a stipulation of dismissal with prejudice dated May 29, 2020.

After plaintiff's settlement with Lavin, Mountain Creek filed its motion seeking reimbursement from Lavin for defending plaintiff's allegations and indemnification from Lavin.[1] Lavin filed a cross-motion for summary judgment on September 1. That led to the order under review.

The judge concluded that, as a matter of law, the indemnification provisions were ambiguous and thus unenforceable to compel indemnification in favor of Mountain Creek for claims of its own negligence. The motion judge denied Lavin's cross-motion for summary judgment in part and granted it in part. The motion judge requested the parties submit the detail and extent of defense costs incurred by Mountain Creek for costs incurred for which liability was only vicarious.

Mountain Creek's attorneys stipulated that there were no fees or costs incurred from defending vicarious liability claims. On December 14, 2020,

[1] Mountain Creek did not contribute towards plaintiff's settlement with Lavin.

Judge Robert J. Brennan entered a consent order resolving all remaining issues as to all parties.

Mountain Creek raises the following arguments on appeal:

> POINT I
>
> STANDARD OF REVIEW—DE NOVO[.]
>
> POINT II
>
> THE [MOTION JUDGE] CORRECTLY RULED THAT THE TWO AGREEMENTS WERE NOT CONTRACTS OF ADHESION NOR WERE THEY CONTRARY TO PUBLIC POLICY.
>
> POINT III
>
> THE [MOTION JUDGE] ERRED IN FINDING THAT THE LANGUAGE IN THE AGREEMENTS SIGNED BY . . . LAVIN IS AMBIGUOUS AND INSUFFICIENT TO COMPEL . . . LAVIN TO INDEMNIFY AND DEFEND MOUNTAIN CREEK FOR CLAIMS OF ITS OWN NEGLIGENCE.
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> A. Special Status Of A Ski Operator.
>
> B. The Two Agreements Were Unambiguous And Should Be Enforced.[2]

Mountain Creek raises the following points in reply, which we have renumbered:

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[2] To comport with our style conventions, we altered the capitalization of Mountain Creek's Points A and B but omitted the alterations for readability.

POINT IV

. . . LAVIN'S REQUEST THAT THE APPELLATE DIVISION REVERSE THE [MOTION JUDGE]'S JUDGMENT THAT THE CONTRACTS WERE NOT UNCONSCIONABLE SHOULD BE REJECTED AS NO CROSS-APPEAL WAS FILED.

POINT V

THE AGREEMENTS IN QUESTION ARE ENFORCEABLE AND NOT UNCONSCIONABLE CONTRACTS OF ADHESION.

POINT VI

THE INDEMNIFICATION LANGUAGE IS SUFFICIENT AND EXPRESSLY PROVIDES FOR INDEMNIFICATION FOR CLAIMS ASSERTING MOUNTAIN CREEK'S OWN NEGLIGENCE.

We review the motion judge's grant of a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). We apply the same standard as the motion judge and consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

I.

Mountain Creek contends the motion judge erred in ruling the indemnification provisions in the Release and Rental Agreements were ambiguous and unenforceable to compel Lavin to indemnify Mountain Creek for Mountain Creek's own negligence. Mountain Creek also contends that it should be permitted to obtain indemnification from Lavin based on its special status as a ski area operator under the Ski Statute.

The judge's role "in construing a contractual indemnity provision is the same as in construing any other part of a contract—it is to determine the intent of the parties." Kieffer v. Best Buy, 205 N.J. 213, 223 (2011). Generally, courts give contractual provisions "their plain and ordinary meaning." Ibid. (quoting M.J. Paquet, Inc. v. N.J. Dep't of Transp., 171 N.J. 378, 396 (2002)). "However, indemnity provisions differ from provisions in a typical contract in one important aspect. If the meaning of an indemnity provision is ambiguous, the provision is 'strictly construed against the indemnitee.'" Ibid. (quoting Mantilla v. NC Mall Assocs., 167 N.J. 262, 272 (2001)).

We have characterized this approach as a "bright line" rule requiring "explicit language" when "indemnification includes the negligence of the indemnitee." Azurak v. Corp. Prop. Invs., 347 N.J. Super. 516, 523 (App. Div.

2002). Azurak involved a contract between a janitorial company (PBS) and a shopping mall owner (the Mall) that contained the following provision:

> Contractor [PBS] shall indemnify, defend and hold harmless each Indemnitee [the Mall] from and against any claim (including any claim brought by employees of Contractor), liability, damage or expense (including attorneys' fees) that such Indemnitee may incur relating to, arising out of or existing by reason of (i) Contractor's performance of this Agreement or the conditions created thereby (including the use, misuse or failure of any equipment used by Contractor or its subcontractors, servants or employees) or (ii) Contractor's breach of this Agreement or the inadequate or improper performance of this Agreement by Contractor or its subcontractors, servants or employees.
>
> [Azurak v. Corp. Prop. Invs., 175 N.J. 110, 111 (2003) (alterations in original).]

The plaintiff sued the Mall and PBS for injuries she sustained when she slipped on the Mall's floor. Ibid. The trial judge granted the Mall's summary judgment motion on the issue of indemnification based on the contract provision. Ibid. At trial, the jury determined "that plaintiff was 30% negligent; the Mall, 30%; and PBS, 40%." Ibid. This court disagreed with the trial judge, finding that the indemnification provision did not encompass the Mall's negligence because the provision's language was neither explicit nor unequivocal as to claims of the Mall's own negligence. Id. at 111-12. Our Court affirmed and held that "in

order to allay even the slightest doubt on the issue of what is required to bring a negligent indemnitee within an indemnification agreement, we reiterate that the agreement must specifically reference the negligence or fault of the indemnitee." Id. at 112-13.

Mountain Creek's Release Agreement contained a provision that states:

> INDEMNIFICATION. To the fullest extent permitted by law, I agree to DEFEND, INDEMNIFY AND HOLD HARMLESS Mountain Creek from any and all claims, suits, costs and expenses including attorneys' fees asserted against Mountain Creek by me or third parties arising or allegedly arising out of or resulting from my conduct while utilizing Mountain Creek's facilities WHETHER OR NOT MOUNTAIN CREEK'S NEGLIGENCE contributed thereto in whole or in part.

One provision of the Rental Agreement states:

> To the fullest extent permitted by law, I also agree to DEFEND, INDEMNIFY AND HOLD HARMLESS Mountain Creek from any and all claims, suits, costs and expenses including attorneys' fees for personal injury, death or property damage against it by me or third parties arising or allegedly arising out of or resulting from my conduct while utilizing Mountain Creek's facilities or the use of this equipment whether or not MOUNTAIN CREEK'S NEGLIGENCE contributed thereto in whole or in part.

We agree with the motion judge that the indemnity provisions in the agreements are ambiguous as to claims of Mountain Creek's independent

negligence. Although the provisions reference Mountain Creek's negligence in bold and capitalized letters, the language "arising out of or resulting from my conduct . . . whether or not MOUNTAIN CREEK'S NEGLIGENCE contributed thereto in whole or in part" is insufficient to meet the Azurak standard. One could reasonably interpret the provisions to require indemnification and defense of Mountain Creek for any claims of negligence against it caused by Lavin's conduct even when Mountain Creek is partially at fault or to require Lavin to indemnify and defend Mountain Creek for separate claims of its own negligence. See Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997) (noting that a contract is ambiguous if it is "susceptible to at least two reasonable alternative interpretations" (quoting Kaufman v. Provident Life & Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J. 1992), aff'd, 993 F.2d 877 (3d Cir. 1993))).

An indemnitor may expect to indemnify and defend an indemnitee for claims caused by its negligent conduct when the indemnitee may also be at fault but may not expect to be solely responsible to indemnify and defend the indemnitee when the indemnitee has committed separate acts of negligence. That is the case here, as plaintiff's complaint alleged Mountain Creek was separately negligent for failing to provide adequate instructions to skiers and a safe ski environment. A better—and likely enforceable—provision would

explicitly state that the indemnitor indemnifies Mountain Creek for claims arising out of indemnitor's conduct and for claims of Mountain Creek's independent negligence.

The provisions at issue do not meet the bright line rule requiring "unequivocal terms" that the duty to indemnify extends to the indemnitee's own negligence. Thus, the provisions are ambiguous and must be strictly construed against Mountain Creek. The same reasoning and standards apply with equal force to Mountain Creek's defense costs. The provisions' ambiguity precludes their enforcement against Lavin for recovery of the costs incurred by Mountain Creek for defending its own negligence claims.

We also conclude Mountain Creek's argument that the Ski Statute supports enforcement of the indemnification provisions is without merit. While the Ski Act may emphasize the inherent risk that skiers assume when skiing, the Act provides separate duties to the ski operator, which include establishing and posting a system for identifying slopes and their difficulty, ensuring the availability of information to skiers, and removing hazards as soon as practicable. N.J.S.A. 5:13-3(a). The allegations in plaintiff's complaint, which include failing to provide adequate signage and failing to instruct skiers properly, do not fall under the risks that "are essentially impractical or

impossible for the ski area operator to eliminate" defined in the statute. N.J.S.A. 5:13-1(b). In fact, plaintiff's complaint addressed the responsibilities of a ski area operator as prescribed by the Act. Requiring indemnification in favor of a ski resort for claims of its own independent negligence does not further the Ski Act's purpose of allocating the inherent risk of skiing between the skier and ski resort. Moreover, the public policy of the Ski Act has no bearing on our interpretation of the indemnity provisions and our conclusion that the provisions are ambiguous.

II.

Lavin argues, on an alternative basis, that the Rental and Release Agreements are unconscionable contracts of adhesion. Lavin was not required to file a Notice of Cross-Appeal to preserve this argument for appeal because "appeals are taken from judgments, not opinions, and, without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial [judge's] judgment." Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984). Even if Lavin were required to file a cross-appeal, we will address the merits of his argument.

As a threshold issue, we determine that the Release and Rental Agreements were contracts of adhesion. If a contract is characterized as a

contract of adhesion, "nonenforcement of its terms may be justified on other than such traditional grounds as fraud, duress, mistake, or illegality." Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992). An adhesion contract is one that "is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars." Vitale v. Schering-Plough Corp., 231 N.J. 234, 246 (2017) (quoting Rudbart, 127 N.J. at 355). "Although a contract of adhesion is not per se unenforceable, a [judge] may decline to enforce it if it is found to be unconscionable." Ibid.

We agree with the motion judge that "the Agreements at issue evidence characteristics of contracts of adhesion." The Release and Rental Agreements were standardized form contracts that fit our Court's definition as "take-it-or-leave-it" adhesion contracts. See ibid. All potential skiers at Mountain Creek's resort are obligated to sign the Release Agreement, and there is little to no negotiating done before the agreements' execution. However, an agreement found to be an adhesion contract may nevertheless be enforced if it is not unconscionable. See ibid.

When determining whether an adhesion contract is unconscionable, we evaluate four factors that "focus on procedural and substantive aspects of the

contract to determine whether the contract is so oppressive, or inconsistent with the vindication of public policy, that it would be unconscionable to permit its enforcement." Id. at 247 (internal quotation marks omitted) (quoting Rodriguez v. Raymours Furniture Co., Inc., 225 N.J. 343, 367 (2016)). Those factors include "the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the 'adhering' party, and the public interests affected by the contract." Rudbart, 127 N.J. at 356. The first three factors speak to procedural unconscionability, and the last factor speaks to substantive unconscionability. See Rodriguez, 225 N.J. at 367. We consider these factors using a "sliding scale analysis." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 301 (2010).

The motion judge correctly relied on Stelluti in determining the agreements are not procedurally unconscionable. In Stelluti, the plaintiff was injured in a spinning class at a private fitness center and argued that the pre-injury waiver of liability she signed was unenforceable on unconscionability grounds. Id. at 291, 300. The Court found that although the pre-printed form was an adhesion contract, it was not procedurally unconscionable. Id. at 301-02. The Court reasoned the plaintiff was not in a position of unequal bargaining power, despite being a layperson and not being fully informed of the legal effect

of an adhesion contract, when she had the ability to take "her business to another fitness club," to find a form of exercise different than joining a private gym, or to contemplate the agreement for some time before joining the gym and using its equipment. Id. at 302.

Under the Court's reasoning in Stelluti and applying the four-factor test, the Release and Rental Agreements are not procedurally unconscionable. At the time of the incident, Lavin was twenty years old and a layperson without specialized knowledge of the law. He maintains he did not read the agreements before signing them despite having the opportunity to do so. Lavin also stated that he did not have the opportunity to negotiate the terms of the agreement. However, Lavin was engaging in a recreational activity like the adhering party in Stelluti, and he was under no economic duress or obligation to consent to the agreements. Lavin could have chosen to take his business to another ski resort, rented skis from a different facility, or could have simply read the agreements or contemplated them before signing.

As for the remaining factor—the impact on public interest—Mountain Creek points to the "strong public policy of protecting ski operators and allocating the risks and costs of inherently dangerous recreational activities" under the Ski Statute. The Act's purpose

> is to make explicit a policy of this State which clearly defines the responsibility of ski area operators and skiers, recognizing that the sport of skiing and other ski area activities involve risks which must be borne by those who engage in such activities and which are essentially impractical or impossible for the ski area operator to eliminate. It is, therefore, the purpose of this act to state those risks which the skier voluntarily assumes for which there can be no recovery.
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> [N.J.S.A. 5:13-1(b).]

We agree that the Agreements are not substantively unconscionable. The agreements do not contain terms that are so "harsh" or "one-sided" to render them unconscionable and unenforceable. See Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 15 (2006). Construing the indemnity provision against Mountain Creek due to its ambiguity, the provision requires that Lavin indemnify and defend Mountain Creek for claims arising out of Lavin's conduct while using Mountain Creek's equipment and facilities, even when Mountain Creek is partially at fault. This indemnification scheme is consistent with the Ski Act's purpose to promote "the allocation of the risks and costs of skiing" as "an important matter of public policy." N.J.S.A. 5:13-1(a). Moreover, in Stelluti, the Court considered that "some activities involve a risk of injury and thus require risk sharing between the participants and operators" and that our Legislature has enacted statutes to address the allocation of risk in

those circumstances. 203 N.J. at 308. It would not be against public policy to require indemnification of Mountain Creek by Lavin for claims of vicarious liability due to Lavin's reckless conduct; however, Mountain Creek stipulated that it did not incur any costs in defending claims of vicarious liability.

Affirmed.