

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOVEREIGN BANK,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 04-2476
	:	
v.	:	
	:	
R.R. DONNELLEY & SONS CO.,	:	
	:	
Defendant and	:	
Third-Party	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TRANSPORTATION CONSULTANTS OF	:	
AMERICA,	:	
	:	
Third-Party	:	
Defendant	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

FEBRUARY 6, 2006

I. BACKGROUND

Plaintiff, Sovereign Bank, and defendant, R.R. Donnelley & Sons Company ("R.R. Donnelley"), entered into a courier service contract under which R.R. Donnelley was to transport Sovereign Bank's money to, from, and between Sovereign Bank's various bank branches. R.R. Donnelley subcontracted some of the work out to third-party defendant, Transportation Consultants of America ("TCA").

Sovereign Bank alleges that while an employee of TCA was making a pick-up from a Sovereign Bank branch in Boston, Massachusetts, the employee left the car unlocked with the keys

inside. Also inside the car were two bags containing Sovereign Bank items from a previous pick-up. A thief then entered the car without force and drove off with, among other items, \$98,147.06 worth of non-processed Sovereign Bank checks. The checks were never recovered. R.R. Donnelley would not compensate Sovereign Bank for the losses.

Sovereign Bank brought a breach of contract action against R.R. Donnelley. Sovereign Bank seeks damages in the amount of \$115,136.29: \$98,147.06 for the face value of the stolen checks, \$1,857.23 in unreconstructed missing ATM deposits, one \$1,100 missing loan payment, and \$14,032.00 for costs incurred to reconstruct the stolen items.

R.R. Donnelley contends that certain provisions of the contract with Sovereign Bank limit its liability. R.R. Donnelley also filed a third-party complaint seeking indemnification from its subcontractor, TCA.

Now before the Court is R.R. Donnelley's partial motion for summary judgment against Sovereign Bank and R.R. Donnelley's motion for summary judgment against TCA. R.R. Donnelley seeks partial summary judgment against Sovereign Bank, contending that Sovereign Bank's damages are contractually limited to a maximum of \$5,000 for non-processed items and \$50,000 for reconstruction costs. R.R. Donnelley also seeks summary judgment against third-party defendant TCA, alleging that TCA is contractually obligated

to indemnify it for this loss.

II. DISCUSSION

A. Legal Standard

A court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. In determining whether any genuine issues of material fact exist, all inferences must be drawn, and all doubts must be resolved, in favor of the non-moving party. Coregis Ins. Co. v. Baratta & Fenerty, Ltd., 264 F.3d 302, 305-06 (3d Cir. 2001).

B. Applicable Law

Under Illinois law,¹ a trial court must initially

¹ Both contracts at issue provide that Illinois law applies: Paragraph III.C of the Sovereign Bank and R.R. Donnelley contract and Paragraph 16 of the TCA and R.R. Donnelley contract. No party contends that the law of any other jurisdiction should govern. Therefore the Court will apply Illinois law in

determine, as a question of law, whether a contract is ambiguous as to the parties' intent. Central Ill. Light Co. v. Home Ins. Co., 821 N.E.2d 206, 214 (Ill. 2004); Quake Constr., Inc. v. American Airlines, Inc., 565 N.E.2d 990, 994 (Ill. 1990). A contract is ambiguous "if it is capable of being understood in more sense than one," Farm Credit Bank of St. Louis v. Whitlock, 581 N.E.2d 664, 667 (Ill. 1991), i.e., it is capable of two or more reasonable interpretations, see, e.g., Platt v. Gateway Int'l Motorsports Corp., 813 N.E.2d 279, 283 (Ill. App. Ct. 2004); Installco Inc. v. Whiting Corp., 784 N.E.2d 312, 319 (Ill. App. Ct. 2002). If the contract is deemed ambiguous by the trial court, the interpretation of the language becomes a question of fact which a trial court cannot properly determine. Farm Credit Bank, 581 N.E.2d at 667; Quake Constr., 565 N.E.2d at 994.

C. R.R. Donnelley v. Sovereign Bank

1. Applicable provisions of the contract between Sovereign Bank and R.R. Donnelley

Sovereign Bank and R.R. Donnelley entered into a contract on March 24, 2000, entitled "Agreement for Logistics Management Services" ("the Agreement"). Under the Agreement, R.R. Donnelley was to provide courier services for Sovereign Bank.

construing the contracts. See, e.g., Echols v. Pelullo, 377 F.3d 272, 275 (3d Cir. 2004) (holding that if the parties have agreed to the applicable law, that agreed-upon law shall generally be given effect).

Paragraph II.D of the Agreement, entitled

"Loss/Reconstruction of Documents," states:

In the event there is a loss or discrepancy, [R.R. Donnelley] shall cooperate in conducting a full investigation. [R.R. Donnelley] agrees to maintain custody of Non-Processed items and shall be liable to Sovereign, from the time at which [R.R. Donnelley] accepts such items until delivery to Sovereign's central processing locations or other location designated by Sovereign, for \$5,000 face value and \$50,000 reconstruction costs, as defined below, per occurrence.

R.R. Donnelley argues that the limitation on liability in Paragraph II.D applies to any situation where there is a "loss or discrepancy" of non-processed items, such as is the case here, regardless of its cause. R.R. Donnelley further contends that Paragraph II.D reflects the intent of the parties to fashion a special contractual section to cover reconstruction efforts and remedies for loss of non-processed items such as checks.

According to R.R. Donnelley, under paragraph II.D, its liability is thus limited to \$5,000 (of the \$98,147.06 sought by Sovereign Bank for the value of the non-processed checks). R.R. Donnelley does not dispute that the contract permits for recovery of the \$14,032 sought by Sovereign Bank for reconstruction costs.

Sovereign Bank responds that the dispute is not governed by Paragraph II.D because that provision applies only to situations "where a loss is not occasioned . . . by a concomitant breach of warranty." (Pl.'s Br. 2.) In this case, however,

Sovereign Bank argues that "[t]his is theft occasioned by breach of warranty, not simple loss, and section II.D. therefore does not apply." (Id.)

Sovereign Bank contends that R.R. Donnelley breached the warranty described in Paragraph III.A: "[R.R. Donnelley] will warrant that the services performed under this Agreement will be done in a correct and accepted industry standard manner and that all services performed will be free from omissions, errors and miscalculations." And Sovereign Bank argues that in circumstances where there is breach of warranty, Paragraph III.M of the Agreement (and not Paragraph II.D), entitled "LIMITATION OF WARRANTIES AND LIABILITY" governs. Paragraph III.M states:

THE LIMITED WARRANTIES SET FORTH IN THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND [R.R. DONNELLEY] EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE. Each party's ("First Party") liability to the other party ("Other Party") arising out this Agreement or for any other reason relating to or arising from the products and services provided under this Agreement, including claims for contribution or identity, will be limited to the amounts the First Party has paid to the Other Party under this Agreement. IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR EXEMPLARY DAMAGES OR LOST PROFITS, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. Said limitations shall not apply and [R.R. Donnelley] may be responsible for consequential damages if the damages suffered by Sovereign result from [R.R. Donnelley's] or its Sub-contractor's gross negligence or willful misconduct.

Sovereign Bank thus believes that because the services performed were not "done in a correct and accepted industry standard manner" and were not "free from omissions, errors and miscalculations" (Paragraph III.A), then R.R. Donnelley is liable to Sovereign Bank "limited to the amounts [Sovereign Bank] has paid to [R.R. Donnelley] under [the] Agreement"² (Paragraph III.M).

The issue is, thus, which provision controls: Paragraph II.D (limitations on liability for loss of non-processed items), as argued by R.R. Donnelley, or Paragraph III.M (limitations on liability for breach of warranties), as argued by Sovereign Bank.

2. The contract is ambiguous

The Court finds that, as a matter of law, the contract between the parties is ambiguous. On one hand, Paragraph II.D suggests that the parties intended to cap liability whenever there is a "loss" involving non-processed items. On the other hand, Paragraph III.M suggests that there is a less restrictive cap on liability whenever conduct reaches a certain level of culpability, i.e., conduct that breaches a contractual warranty.³

² Sovereign Bank submitted the affidavit of Tom Brunner, the Transportation Manager for Sovereign Bank. Mr. Brunner states that Sovereign Bank pays R.R. Donnelley \$4.2 million under the Agreement, an amount far in excess of the amount claimed by Sovereign Bank in this action.

³ For example, as suggested by Sovereign Bank, if the courier appropriately secured the car before she went inside the bank, but a thief smashed a car window and stole a bag of

In the instant case, the circumstances present a combination of the elements of both provisions as there is a "loss" involving non-processed items (Paragraph II.D) caused by conduct that breaches a contractual warranty (Paragraph III.M). The contract is silent as to which provision controls when a circumstance arises that makes both provisions equally applicable.⁴

This ambiguity creates a genuine issue of material fact as to the intent of the parties and requires extrinsic evidence. The intent of the parties and the interpretation of the scope of the provisions is within the province of the jury and cannot be decided by the Court as a matter of law. Thus, defendant's motion for partial summary judgment will be denied.

Sovereign Bank checks, then Sovereign Bank would have suffered a "loss" without an accompanying breach of warranty and liability would be limited under Paragraph II.D. However, in the circumstances of this case, the conduct of the employee arguably constitutes a breach of warranty under Paragraph III.A., and thus, according to Sovereign Bank, Paragraph III.M would control.

⁴ Under Illinois law, "where an ambiguity exists in a contract due to a conflict between two of its provisions, the more specific provision relating to the same subject matter controls over the more general provision." Countryman v. Indus. Comm'n, 686 N.E.2d 61, 64 (Ill. App. Ct. 1997) (emphasis added); see also Boatmen's Nat'l Bank of St. Louis v. Smith, 835 F.2d 1200, 1203 (7th Cir. 1987); Grevas v. U.S. Fid. & Guar. Co., 604 N.E.2d 942, 944 (Ill. 1992). This rule of construction does not apply here. The overlapping provisions do not relate to "the same subject matter" as Paragraph II.D relates to losses of non-processed items and Paragraph III.M relates to breaches of warranties.

C. R.R. Donnelley v. TCA

1. Applicable provisions of the contract between TCA and R.R. Donnelley

R.R. Donnelley argues that under the subcontract with third-party defendant TCA, it is entitled to full indemnification as a matter of law. R.R. Donnelley and TCA entered into a contract on October 16, 2000, entitled "R.R. Donnelley Logistics Services, Expedited Services Contract" ("the Contract"). Under the Contract, TCA was to provide insurance for "Reconstruction in the amount of \$100,000 per occurrence, and non-reconstruction in the amount of \$5,000 per occurrence, naming R.R. Donnelley & Sons company as loss payee." (Paragraph 1.B.v.) Additionally, Paragraph C, entitled "Insurance Indemnification," states:

Without excluding or limiting other obligations of indemnity, [TCA] shall contract and shall indemnify as a distinct and material obligation of [TCA] to [R.R. Donnelley] in every instance where [R.R. Donnelley] is not allowed the benefits of insurance required by this Agreement by reason of [R.R. Donnelley] being named as an additional named insured as follows:

. . .

(ii) [TCA] shall indemnify and hold [R.R. Donnelley] harmless from any liability, loss, cost, damage or expense, including attorneys' fees, which may accrue against [R.R. Donnelley] by reason of any liability claims, cargo claims and workers compensation claims by an entity that arises out of or are due to acts or failure to act of [TCA]

R.R. Donnelley contends that, either through insurance under

Paragraph 1.B.v or from another source under Paragraph C, TCA is financially liable.

In response, TCA argues that summary judgment is "premature" because "only once the nature and extent of Donnelley's liability to Sovereign is determined is it possible to determine whether TCA has a duty to indemnify Donnelley for all or part of the loss." (Third-Party Deft. Br. 5.) Further, TCA contends that under Paragraph C, liability is limited to the insurance coverage described in Paragraph 1.B.v. TCA argues that Paragraph C applies only when Donnelley is "not allowed the benefits on insurance." TCA thus does not believe it is liable for losses that exceed the insurance coverage provided by the Contract.

2. The contract is ambiguous

The Court finds that, as a matter of law, the contractual language at issue is ambiguous. It is unclear whether the term, "in every instance where [R.R. Donnelley] is not allowed the benefits of insurance required by this Agreement," (Paragraph C) precludes liability altogether when the Contract calls for some degree of insurance, as argued by TCA, or whether the term requires TCA to cover the excess damage if the insurance coverage is not sufficient, as argued by R.R. Donnelley.

This ambiguity creates a genuine issue of material fact

as to the intent of the parties and requires extrinsic evidence. The intent of the parties and the interpretation of the scope of the provisions is within the province of the jury and cannot be decided by the Court as a matter of law. Thus, R.R. Donnelley's motion for summary judgment will be denied.

III. CONCLUSION

R.R. Donnelley's motion for partial summary judgment against Sovereign Bank, and motion for summary judgment against TCA, are denied. An appropriate order follows.

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Defendant and	:	
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Plaintiff,	:	
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	:	
TRANSPORTATION CONSULTANTS OF	:	
AMERICA,	:	
	:	
Third Party	:	
Defendant	:	

O R D E R

AND NOW, this **6th** day of **February, 2006**, it is hereby **ORDERED** that defendant's motion for partial summary judgment against plaintiff (doc. no. 14) is **DENIED**.

IT IS FURTHER ORDERED that defendant's motion for summary judgment against third-party defendant (doc. no. 14) is **DENIED**.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.