IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 06-CV-00865-LTB-BNB

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation, LAURA HERSHEY, CARRIE ANN LUCAS, HEATHER REBEKAH RENEE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, ADRIANNE EMILY MONIQUE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, ASIZA CAROLYN KOLENE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, and DANIEL WILSON

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO

Defendant and Third-Party Plaintiff,

v.

SEMPLE BROWN DESIGN, P.C.

Third-Party Defendant.

THIRD-PARTY DEFENDANT SEMPLE BROWN DESIGN, P.C.'S RESPONSE TO THIRD PARTY PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Third-Party Defendant, Semple Brown Design, P.C. ("Semple Brown"), by and through its attorneys Jackson Kelly PLLC, submits its Response to Third Party Plaintiff's Motion for Partial Summary Judgment as follows:

I. Introduction

On or about August 12, 2002, Semple Brown entered into an Agreement to provide architectural design services for the City and County of Denver (the "City"). The

Agreement included a limited indemnity provision whereby Semple Brown agreed to indemnify the City for certain actions and omissions attributable to Semple Brown. Relying heavily on case law from other jurisdictions and from insurance law, the City now asserts that the contract language should be broadly construed to require Semple Brown to defend the City for claims arising in this present action and seeks a declaration to that effect.

The City's interpretation of the contract's indemnity provision is unduly broad, contrary to the plain language of the contract, and contrary to the intent of the parties in including the provision. Unlike an insurance contract, the fundamental purpose of an Agreement for architectural services is not to provide broad coverage regardless of fault. As with most construction contracts, an indemnity provision is included as an acknowledgement that should liability arise from the scope of services in the contract, the responsible party agrees to bear the costs of that liability. The indemnity provision in this Agreement is no different. Semple Brown agreed to indemnify the City for Semple Brown's own negligent or tortious actions or omissions. Although the term "defend" appears in the context of the indemnification clause, it was not contemplated as extending beyond Semple Brown's duty to indemnify the City.

While Semple Brown does not believe it has a duty to defend the City separate from its duty to indemnify the City, should the Court find otherwise, there are numerous questions of material fact that remain unanswered which preclude a finding that such a duty has been triggered. The indemnity provision is limited to that circumstance in which Semple Brown has been found liable for "tortious or negligent actions or

omissions" "in connection with its operations or performance herewith or its use or occupancy of real or personal property hereunder." At this stage in the proceedings, there has been no determination that Semple Brown has acted or failed to act in a tortious or negligent manner. Absent such a finding, Semple Brown's duties to the City are inchoate, and summary judgment as to this issue should be denied.

Finally, summary judgment is also inappropriate, as the City's own culpability may estop the City from seeking defense and indemnification. The allegations in the Plaintiff's complaint concern construction and/or design related issues for which the City or other parties may be at fault. In authorizing the design, demanding modifications to the design, and in expressly rejecting the recommendations of Semple Brown, the City may be fully liable for any damages which may arise from alleged design defects. As these determinations turn upon numerous issues of fact yet to be discovered or resolved, it would be premature for the Court to rule on Semple Brown's indemnity and defense obligations to the City. For these reasons, among others, the City's Motion for Partial Summary Judgment should be denied.

II. Applicable Law

A. Summary Judgment

Summary judgment is proper if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, (1986). The moving party bears the burden of showing that the material facts in the case are undisputed. *Celotex,* 477 U.S. at 322. "Denver, as the

moving party, has the initial burden to show 'that there is an absence of evidence to support the nonmoving party's case.'" *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1517-18 (10th Cir. 1994) (internal citations omitted). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." Id. at 1518.

B. Contract Interpretation

"It is axiomatic that a contract must be construed to ascertain and effectuate the intent of the parties as determined primarily from the language of the contract." East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co., 109 P.3d 969, 974 (Colo. 2005). An integrated contract is interpreted in its entirety to harmonize and give effect to all its provisions so that none will be rendered meaningless, and its terms are enforced according to their plain and generally accepted meanings. Trosper v. Wilkerson, 764 P.2d 375, 376 (Colo. App. 1988). Only where "the terms of an agreement are ambiguous or are used in some special or technical sense not apparent from the contract itself," may the court look beyond the four corners of the agreement. Id. at 376-77 (citation omitted). "If the court determines a contract is ambiguous and its construction depends on extrinsic evidence, then the interpretation of the contract becomes a question of fact." Stegall v. Little Johnson Assocs., Ltd., 996 F.2d 1043, 1048 (10th Cir. 1993) (citations omitted).

Indemnity agreements are interpreted by the same rules of construction that govern contracts generally. Mid Century Ins. Co. v. Gates Rubber Co., 43 P.3d 737, 739 (Colo. App. 2002). "The extent of a contractual duty to indemnify must be determined from the contract itself." May Dept. Stores Co. v. University Hills, Inc., 824 P.2d 100,

101 (Colo. App. 1991) (citing Wilson & Co. v. Walsenburg Sand & Gravel Co., 779 P.2d 1386 (Colo. App.1989)). To the extent there are ambiguities in the indemnity agreement, they are to "be resolved against the party seeking indemnity." Williams v. White Mountain Const. Co., Inc., 749 P.2d 423, 426 (Colo. 1988). See also Heppler v. J.M. Peters Co., 87 Cal. Rptr. 2d 497, 509 (Cal. App. 4 Dist. 1999) ("Indemnity provisions are to be strictly construed against the indemnitee....").

III. Argument

A. Semple Brown's Duties are Limited to Claims Attributed to Semple Brown's Tortious or Negligent Actions or Omissions

The contract is the sole source of any duty Semple Brown has to defend or indemnify the City. Accordingly, the scope of that duty is determined by the language of the contract. The relevant provision states as follows:

> **14.2 Indemnification:** The Design Consultant shall defend, release, indemnify, and save and hold harmless the City, its officers, agents and employees from and against: (1) any and all damages, including but not limited to loss of use, to property or injuries to or death of any person or persons (including but not limited to property and officers, agents and employees of the City) and (2) any and all claims, demands, suits, actions, liabilities, costs expenses (including but not limited to reasonable attorney fees, expert witness fees and all associated defense fees), causes of action, or other legal, equitable or administrative proceedings of any kind or nature whatsoever, of or by anyone whomsoever, regardless of the legal theory(ies) upon which premised, including but not limited to contract, tort, express and/or implied warranty, strict liability, and workers' compensation, **in any way resulting from, connected with, or arising out of, directly or indirectly, the tortious or negligent actions or omissions of the Design Consultant or those performing under it in connection with its operations or performance herewith or its use or occupancy of real or personal property hereunder**, including the tortious or negligent actions or omissions of subconsultants, and tortious or negligent acts or omissions of the officers, employees, agents, representatives, invitees, or

> licensees of the Design Consultant or its subconsultants; provided however, that the Design Consultant need not indemnify the City or its officers, agents and employees from damages proximately caused by and apportioned to the negligence of the City's officers, agents and employees.

See Third Party Plaintiff's Ex. 1, Art. XIV (14.2) (emphasis added).

As expressly set forth in the Section 14.2, the duties therein are contingent upon "the tortious or negligent actions or omissions of the Design Consultant or those performing under it...." As evidenced by this language, the intent of this provision is to limit the defense and indemnification duties owed by Semple Brown to tortious or negligent actions or omissions attributed to Semple Brown and/or its subconsultants, officers, employees, agents, representatives, invitees, or licensees. It protects the City from liability for which Semple Brown is responsible. Consistent with that end, it also expressly excludes liability attributable to the negligence of the City's officers, agents and employees ("...the Design Consultant need not indemnify the City or its officers, agents and employees from damages proximately caused by and apportioned to the negligence of the City's officers, agents and employees.").

The plain language of Section 14.2 conditions the obligations of Semple Brown upon a finding that Semple Brown committed tortious or negligent acts or omissions. At this stage in the proceedings, there has been no such finding. Discovery is ongoing and the issues of liability are hotly contested and are the primary subject of the lawsuit. Until such a determination has been made, the duties under Section 14.2 are not triggered, because unproven allegations are insufficient to trigger the obligations thereunder. See, e.g., May Dep't Stores Co. v. University Hills, Inc., 824 P.2d 100 (Colo. App. 1991)

(Exclusion provision of lease agreement providing that tenant's indemnification obligation did not apply to claims that arise "from any negligent act or omission" of landlord, and which defined "claims" as "claims, damages, costs, expenses (including reasonable attorney fees and court costs) and liabilities," freed tenant from its obligation to indemnify landlord only if claims at issue arose from actual negligent acts of landlord; thus, unproven allegations of landlord's negligence were insufficient to invoke exclusion provision.). Accordingly, summary judgment on this issue is premature and will remain so until all issues of material fact pertaining to liability in the case have been resolved.[1]

B. **Semple Brown's Duty to Defend is No Broader Than its Duty to Indemnify**

Contractual indemnity clauses are strictly construed against the indemnitee, and unlike in the insurance context, there is no duty that extends beyond the parties' agreement. Compare Cyprus Amax Minerals Co., 74 P.3d at 299 (construing ambiguous provisions against the insurer and in favor of providing coverage to the insured) with Williams, 749 P.2d at 426 (construing ambiguous provisions against the party seeking indemnity). See also May Dept. Stores Co., supra. Contrary to the City's assertions, Semple Brown's contractual duty to defend is not the same as that of an insurer's duty to defend, nor is it triggered by the "Complaint Rule." Rather, Semple Brown's duty to defend is limited by its agreement such that it is no broader that Semple Brown's duty to indemnify.

[1] The question of whether the parties intended the scope of the indemnity clause to include the duty to defend is itself a question of fact which precludes summary judgment. See Stegall, 996 F.2d at 1048.

In the insurance context, the duty to defend is recognized as broader than the duty to indemnify. See Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 299 (Colo. 2003). Under Colorado law, "if the alleged facts even potentially trigger coverage under the policy, the insurer is bound to provide a defense." Id. "In the duty to defend context, the 'complaint rule' operates to cast a broad net, such that when the underlying complaint alleges *any facts* or claims that might fall within the ambit of the policy, the insurer must tender a defense." Id. at 301. This broad duty is recognized in light of the "unique nature of insurance contracts and the relationship between the insurer and insured." Id. at 299.

Although the City cites cases outside of Colorado in support of the proposition that the Complaint Rule operates in the non-insurance context, Colorado does not follow this rule. Instead, Colorado follows those jurisdictions which view a non-insurer's duties as far more limited. See, e.g., Rodriguez v. Savoy Boro Park Associates Ltd. Partnership, 759 N.Y.S.2d 107, 108 (N.Y.A.D. 2 Dept. 2003) (subcontractor's duty to defend is no broader than its duty to indemnify); Heppler, 87 Cal. Rptr. 2d at 509, 512-13 ("Indemnity provisions are to be strictly construed against the indemnitee, and had the parties intended to include an indemnity provision that would apply regardless of the subcontractor's negligence, they would have had to use specific, unequivocal contractual language to that effect. ...Insurers have a distinct and free-standing duty to defend their insureds as opposed to indemnitors, whose duty to defend is not triggered until it is determined that the proceeding against the indemnitee is 'embraced by the indemnity.'") (internal citation omitted).

In a recent case, the Colorado Court of Appeals addressed a similar "defend and indemnify" provision in a construction contract and did not apply the Complaint Rule. In D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, the Court found that summary judgment in favor of the indemnitor (subcontractor) on the issue of indemnity was appropriate where the indemnitee (general contractor) failed to offer facts in support of its negligence claim. WL 2522232, *8 -9 (Colo. App. 2008) (unpublished). Significantly, the Colorado Court of Appeals did not elect to treat the duty to defend as distinct from the duty to indemnify, nor did it broadly impose a duty to defend upon the subcontractor. It did not find or impose such duties even though the "defend and indemnify" provision at issue was broader than the one here. The contract between D.R. Horton and D& S Landscaping required:

> D & S to protect, defend, indemnify and hold [D.R.] Horton ... free and harmless from and against any and all claims, demands, causes of actions, suits or other litigation (including all costs thereof and attorneys' fees) of every kind and character ... in any way occurring, incident to, arising out of, or in connection with, (I) a breach of the warranties and covenants provided herein by contractor; (II) the work performed or to be performed by contractor or contractor's personnel, agents, suppliers or permitted subcontractors; or (III) any negligent action and/or omission of the indemnitee related in any way to the work, even when the loss is caused by the fault or negligence of the indemnitee.

Id. at *9. The Colorado Court of Appeals read this "to require in each instance that the contractual indemnity be based upon the work performed by the subcontractors." Id. at *8. Finding an absence of evidence triggering the indemnity provision, the Court dismissed the claims. Id. at *9-10.

As evidenced by the Colorado Court of Appeals' approach in D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, Colorado does not employ the "Complaint Rule" in the non-insurer context. If the Court of Appeals had taken that approach, it would have looked to the pleadings, particularly D.R. Horton's complaint, and the HOA's original complaint which alleged, *inter alia*, "construction defects, including improper soil compaction, improper drainage, exterior and interior concrete problems, improper driveways, and improperly designed and installed landscaping and irrigation." Id. at *1. The Court could easily have found these allegations to include facts or claims arising from either "any negligent action and/or omission of the indemnitee," the "breach of the [D&S Landscaping's] warranties and covenants," or "the work performed or to be performed by [D&S Landscaping]." Id. at *8. Given that the HOA's Complaint only needed to allege any fact concerning negligent landscaping work, this option was readily available to the Court. Instead, the Court limited the subcontract to its terms and declined to follow the broad duty to defend rule employed in the insurance context.

In a recent Vermont case, Tateosian v. State, the Supreme Court of Vermont compared the two approaches to the duty to defend in a similar situation:

> ...obligations assumed through contractual indemnity differ from those an insurance company agrees to provide. For example, as one court explained, while insurance contracts are contracts of adhesion and thus construed against the insurer, as the stronger bargaining power, noninsurance indemnity agreements should be construed against the indemnitee because subcontractors who indemnify general contractors occupy an inferior bargaining position. *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal.2d 40, 41 Cal.Rptr. 73, 396 P.2d 377, 382 (1964). This rationale applies to the current case, where the indemnity language was drafted by the State and included on a standard purchasing form as language applicable to any vendor who did business with the State. The United States Supreme Court

> has noted in this context that the relationship between the federal government and a particular government contractor is one of "a vast disparity in bargaining power and economic resources between the parties." *United States v. Seckinger,* 397 U.S. 203, 212, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970). While this broad generalization may not fully apply to the State of Vermont, it underscores the difference in the relationship between the State and its vendor versus the one between an insured and insurance company. Insurance companies have broader defense obligations because "an insurance company's agreement to defend actions against the insured is one of the 'fundamental obligations' of the insurance contract; in contrast, the agreement to defend and indemnify in a [commercial contract] is incidental to the main purpose of the agreement ...." *Ervin v. Sears, Roebuck & Co.,* 127 Ill.App.3d 982, 82 Ill.Dec. 709, 469 N.E.2d 243, 249 (1984) (citation omitted).

945 A.2d 833, 838 (Vt. 2007).

As Semple Brown's contract involves a non-insurer indemnity provision in a contract between the City of Denver and its vendor, the rationale in Tateosian is particularly helpful here. Unlike an insurer, Semple Brown is in a weaker bargaining position, the indemnification and defense clause is incidental to the agreement, there is no unique relationship wherein Semple Brown has a fundamental obligation to defend actions brought against the City of Denver, no insurance premium has been paid, and the terms of its indemnity clause are expressly limited. As in Tateosian, and consistent with Colorado law, the contract should be viewed under traditional principles of contract interpretation and without the special duties and considerations attendant to agreements between insurance companies and their insured. Accordingly, Semple Brown's duties arise if and only if Semple Brown is the cause of the alleged damage or injury whether by tortious or negligent acts or omissions. They do not arise whenever a claim is asserted against the City without some prior determination of liability.

C. Issues of Material Fact Remain and May Preclude The City From Asserting a Contractual Right to Defense or Indemnity

As noted above, the ultimate issue of liability has yet to be determined. At this early stage, it is unclear whether Semple Brown or the City will be found liable for any of the claims made in Plaintiff's Complaint. It is further unclear as to how liability, if any, will be apportioned. With respect to the specific allegations in Plaintiff's complaint, Semple Brown does not believe it is liable for the alleged defects for a number of reasons, including but not limited to:

- The City's approval of Semple Brown's design;
- The approval of the Mayor's Commission for People With Disabilities of Semple Brown's design and the City of Denver's Department of Public Works as required by the design services agreement, see Third Party Plaintiff's Ex. 1, Art. I (1.8) and Art. IV (4.4);
- The failure of the building to be constructed as designed; see Affidavit of Jonathan Springer, attached here to as **Exhibit A**.
- The City's Administrative Modification, attached hereto as **Exhibit B**, directing, among other things, Semple Brown to alter its choice of elevator;
- Such other affirmative defenses as set forth in Semple Brown's Answer

Viewed in the light most favorable to Semple Brown, it may be assumed that liability, if any, will be entirely apportioned to the City or to other parties for whom Semple Brown is not responsible. In such circumstances, the duties and obligations of Semple Brown under Section 14.2 are not triggered. Given that a finding of no liability

as to Semple Brown is and remains a viable outcome, summary judgment as to the issue of the defense and indemnity provision is altogether premature. Without some determination of liability, Semple Brown simply has no duty to defend or indemnify the City.

Furthermore, if the City is found completely liable, then indemnification and defense are barred both by the terms of the contract (distinguishing between Semple Brown's liability for negligent or tortious acts or omissions and those acts and omissions of the City), and by C.R.S. §13-21-111.5 ("no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss..."). As a matter of law and of public policy, the City cannot contract away its own negligence. See Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 922 (10th Cir. 1993) (citing 6A Arthur L. Corbin, *Corbin on Contracts* § 1472, at 596-97 (1962)) (quoting ANR Production Co. v. Westburne Drilling, Inc., 581 F.Supp. 542, 547 (D. Colo. 1984)).

Finally, notwithstanding a possible finding of liability as to Semple Brown, the City's own culpable conduct may estop the City from seeking defense and indemnification. "While the doctrine of equitable estoppel is not as freely invocable against a municipality as it is against an individual, a court may nevertheless apply the doctrine whenever necessary to prevent manifest injustice. Jones v. City of Aurora, 772 P.2d 645, 647 (Colo. App. 1988) (citations omitted). The doctrine requires that "a party must show that he detrimentally changed position in justifiable reliance on

representations made by the city." Id. (citations omitted). "Once applied the doctrine does not allow a municipality to take a position contrary to its prior position." Id. (citations omitted). "Whether the circumstances of a particular case reveal a representation and reasonable reliance so as to give rise to equitable estoppel is a question of fact." Kohn v. City of Boulder, 919 P.2d 822, 825 (Colo. App. 1995) (citing P-W Investments, Inc. v. Westminster, 655 P.2d 1365 (Colo.1982)).

Here, the City's actions may have effectively waived the City's rights, if any, to defense and indemnification from or by Semple Brown, and the City may be estopped from asserting those rights. To the extent that the City may be responsible for directing, approving, or assuming obligations for Semple Brown, authorizing Semple Brown's design, demanding modifications to the design, and in expressly rejecting the recommendations of Semple Brown during the course of the project, the City may be estopped from seeking defense and indemnification from Semple Brown if Semple Brown justifiably relied on these representations.

As evidenced by the Agreement, the Administrative Modification issued by the City, and as averred in Jonathan Springer's affidavit, the City has been involved in approving Semple Brown's design and in making modifications thereto. It was reasonable for Semple Brown to rely on the City's representations as the City's Building Department, the Department of Public Works, the Mayor's Commission for People with Disabilities, and various other City representatives were involved in the review and approval of the design, and authorized representatives of the City directed and approved design changes. Thus, the City should be estopped from now asserting, contrary to its

previous position, that Semple Brown's design was defective. At the least, it would be manifestly unjust to permit the City to shift its liability onto Semple Brown where the City's own actions may have caused Semple Brown to be exposed to liability for defective design work.

As these determinations turn upon numerous issues of fact yet to be discovered or resolved, it would again be premature for the Court to rule on Semple Brown's indemnity and defense obligations to the City. As this issue is not ripe for determination, the City's Motion should be denied.

IV. Conclusion

The City has brought this motion for partial summary judgment as to the sole issue of Semple Brown's duty to defend. As discussed above, by the terms of the indemnity provision, the duty to defend is conditioned upon "the tortious or negligent actions or omissions of the Design Consultant or those performing under it...." The duty to defend cannot arise until a determination of that condition has been made. Moreover, in the non-insurance context, and contrary to the City's assertions, Colorado does not follow those jurisdictions which treat the duty to defend the same as between insurers and non-insurers. Rather, Colorado follows those jurisdictions which recognize that an insurer's obligations to an insured follow from the unique relationship between an insurer and insured, and that these obligations are not presumed in a non-insurance context. Thus, Semple Brown's duty to defend is no broader than its duty to indemnify and is not triggered by the Complaint Rule or mere unproven allegations.

Finally, as numerous questions of fact have yet to be determined, including the

ultimate issue of liability apportionment, if any, Semple Brown's duties have not been triggered. The possibility remains that there may be no liability as to Semple Brown, whatsoever. In accordance with the express terms of the indemnification provision and in accordance with Colorado's Revised Statues, Semple Brown has no duties as to the City should it be found without fault. And last, even if liability is apportioned to Semple Brown, the City's own actions may estop it from enforcing the defense and indemnity provisions against Semple Brown, as it may have waived these rights through its own actions.

WHEREFORE, for the reasons set forth above, Semple Brown Design, P.C. respectfully requests the City's Motion for Partial Summary Judgment be DENIED.

Dated this 30th day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2008, a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT SEMPLE BROWN DESIGN, P.C.'S RESPONSE TO THIRD PARTY PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was e-filed via CM-ECF addressed to the following:

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