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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GAP, INC., **Plaintiff and Respondent,** **v.** **APEX XPRESS, INC.,** **Defendant and Appellant.**	**A146176** **(San Francisco County Super. Ct. No. CGC-12-526547)**

This appeal concerns an indemnity agreement between Apex Xpress, Inc. (Apex) and The GAP, Inc. (Gap). Following a bench trial, the trial court determined Apex was obligated to indemnify Gap for a portion of defense and indemnity costs incurred in defending a lawsuit filed by an Apex employee. The court also awarded Gap a portion of attorney fees and costs incurred in a declaratory relief action Gap filed against Travelers Insurance Company (Travelers), the company from which Apex purchased insurance. The court entered judgment for Gap.

Apex appeals. We conclude Apex has an obligation to indemnify Gap for a portion of the fees and costs incurred in defending the employee's lawsuit, but that the court erred by awarding Gap a portion of attorney fees and costs incurred in Gap's lawsuit against Travelers. We therefore reverse the portion of the judgment awarding Gap $25,914.76 in attorney fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

Apex is a transportation company. In a 2004 Motor Contract Carrier Transportation Agreement (contract), Apex agreed to deliver Gap merchandise to Gap stores. Paragraph 13 of the contract required Apex to obtain insurance policies naming Gap as an additional insured.

Paragraph 15 — an indemnity provision — provided: "[Apex] agrees to indemnify and hold [Gap] and its subsidiaries, divisions, and affiliated companies free and harmless from any liability, loss, cost, damage or expense, including attorneys' fees, which [Gap] may suffer or incur as a result of any claims that arise out of or result from the rendering of services by [Apex] or a third party agent of [Apex] under this Agreement, whether such claims are based on negligence or intentional acts or omissions of [Apex] or a third party agent of [Apex], breach of contract, breach of warranty, absolute liability or otherwise. [Gap] agrees to indemnify and hold [Apex] harmless from any liability, loss, cost, damage or expense, including attorneys' fees which [Gap] may suffer or incur as a result of any claims that arise out of or result from the negligence or intentional acts of [Gap]."

The Otero Case and Gap's New Jersey Lawsuit Against Travelers

Apex employee Jose Otero was injured while delivering merchandise to a Gap store and he sued Gap (*Otero* case). Gap tendered the lawsuit to Apex and Travelers. Neither Apex nor Travelers accepted the tender. Gap filed a cross-complaint against Apex on several theories, including contractual indemnity. The New Jersey Superior Court granted Apex's summary judgment motion and dismissed all of Gap's claims with prejudice except its contractual indemnity claim.

Gap filed a third party lawsuit against Travelers in New Jersey, seeking a judicial declaration it was entitled to defense and indemnification in the *Otero* case pursuant to an insurance policy Travelers issued to Apex. The New Jersey Superior Court determined Travelers was not required to provide insurance coverage to Gap in the *Otero* case and the appellate division of the superior court affirmed.

Gap eventually paid $750,000 to settle the *Otero* case.

Gap's California Lawsuit Against Apex

Pursuant to a choice of law paragraph in the contract, Gap filed a lawsuit against Apex in California for breach of contract and express indemnity. The complaint alleged Apex breached the contract by: (1) failing to obtain insurance for Gap as an additional insured as required by paragraph 13; and (2) failing to indemnify Gap and reimburse it for costs and fees Gap incurred in defending and settling the *Otero* case as required by paragraph 15. Apex answered the complaint.

The parties agreed to try two issues to the court in phase one: the interpretation of the indemnity provision in paragraph 15, and Gap's claim for breach of contract based on Apex's alleged breach of paragraph 13. The parties further agreed that if Gap did not prevail on its breach of contract claim, a jury would determine whether "Otero's injuries resulted from the negligence of Apex and/or Gap so that there can be an apportionment of fault in order to adjudicate Gap's claims for express indemnification and breach of the indemnity provision."[1]

Following a bench trial, the court determined paragraph 15 required Apex "to indemnify Gap for its defense and indemnity costs as a result of the *Otero* case, minus any apportionment against Gap for its own negligence." As the court explained: "In the first sentence of paragraph 15, Apex agrees to indemnify Gap for any liability which Gap suffers as a result of claims arising from services rendered by Apex, whether the claims are based on Apex's negligence or otherwise. In the second sentence of paragraph 15, Gap agrees to hold Apex harmless from any liability which Gap may suffer as a result of any claims that result from the negligence of Gap. The net effect of the two sentences read together is that Apex has no obligation to indemnify Gap for Gap's negligence. . . .

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[1] In a motion in limine, Apex argued the New Jersey Superior Court determined Gap "was actively negligent in causing Otero's injuries" and Apex "was not" and, as a result, "Gap is collaterally estopped to dispute that finding herein." Apex urged the trial court to exclude "any evidence or argument disputing the finding." The court denied the motion, concluding the issues of "Gap's negligence . . . and Apex's non-negligence" were not "fully litigated or decided in that case, nor was it necessarily decided by the trial court there as part of the coverage decision."

[T]he second sentence of paragraph 15 carves out of Apex's indemnity obligation any indemnity for Gap's negligence." The court declined to determine whether Gap's negligence was "passive" or "active" before deciding Apex's duty to indemnify. As the court explained, "Gap is not seeking indemnity for loss caused by its own negligence. If a jury determines that Gap is 100% liable for the *Otero* case, Apex will simply have no indemnity obligation under paragraph 15."

In phase two, a jury determined Gap was negligent and its negligence was a substantial factor in causing the accident. The jury apportioned 61.25 percent of the fault to Gap. The jury was not asked to make a finding of liability of Apex or any other person or entity.

Gap then sought $66,876.80 in attorney fees incurred in seeking insurance coverage from Travelers. Gap claimed the attorney fees it incurred in pursuing coverage from Travelers for the *Otero* case fell within paragraph 15, which required Apex to reimburse Gap for attorney fees "incur[red] as a result of any claims that arise out of or result from the rendering of services by Apex." In opposition, Apex argued it was not obligated to provide a defense in the Travelers action and that Gap should not be compensated for filing a meritless lawsuit against Travelers.

The parties stipulated to a court trial based on the parties' "written submissions on the issue of whether any or all of the attorney's fees of $66,876.60 incurred by Gap in its unsuccessful effort to seek insurance coverage from Travelers" were recoverable "as contract damages." Applying the trial court's finding from phase one on the meaning of the indemnity language in paragraph 15, the court determined the contract "provides for indemnification of Gap by Apex of attorneys' fees that Gap incurred 'as a result of any claims that arise out of or result from the rendering of services by' Apex, . . . The language covering claims that 'arise out of or result from the rendering of services by' Apex includes Gap's claim against Travelers for insurance coverage. The . . . contract does not limit the type of claims for which indemnification applies, nor does the parties' contract require that the claims for which indemnification apply are limited only to claims brought against Gap. Moreover, the fact that Gap's [judicial declaration] claim

was determined to lack merit does not preclude indemnity by Apex per the terms of the parties' contract. While Gap's incurrence of fees is subject to an implied condition of reasonableness by virtue of the implied covenant of good faith, . . . both the filing of the claim against Travelers and the amount of the fees incurred in pursuing that claim are reasonable. Thus, as a straight-forward contract interpretation exercise, Gap is entitled to indemnity of fees it incurred in its suit against Travelers."

The court reduced the fee award by the "jury finding that Gap's negligence is 61.25% responsible for Mr. Otero's injuries," and awarded Gap $25,914.76. The court entered judgment for Gap for $316,539.76, comprised of $290,625.00 for sums paid by Gap to settle the *Otero* case, and $25,914.76 for attorney fees and costs incurred by Gap in its declaratory relief action against Travelers.

DISCUSSION

I.

The Contract Requires Apex to Indemnify Gap

Indemnity is "the obligation resting on one party to make good a loss or damage another party has incurred." (*Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 (*Rossmoor*).) Indemnity agreements "may require one party to *indemnify* the other, under specified circumstances, for moneys paid or expenses incurred by the latter as a result of such claims." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 551 (*Crawford*).)

As relevant here, indemnity agreements ordinarily fall into two categories. (See *Rossmoor, supra,* 13 Cal.3d at p. 628; see also *McCrary Construction Co. v. Metal Deck Specialists, Inc.* (2005) 133 Cal.App.4th 1528, 1538 (*McCrary*).) The first category includes agreements providing "indemnification against an indemnitee's own negligence." (*McCrary,* at p. 1538.) The second category embraces agreements that do not address the issue of the indemnitee's negligence, a category called " 'general' indemnity clauses." (*Ibid.*) General indemnity agreements "may be construed to provide indemnity for a loss resulting in part from an indemnitee's *passive* negligence, they will

not be interpreted to provide indemnity if an indemnitee has been *actively* negligent." (*Id.* at p. 1537.)

Here, the extent of Apex's duty to indemnify is determined by the contract, and we interpret the indemnity provision using the same rules applicable to other contracts. (*Crawford, supra,* 44 Cal.4th at pp. 551-552; *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1025.) "In interpreting an express indemnity agreement, the courts look first to the words of the contract to determine the intended scope of the indemnity agreement. [Citation.] The intention of the parties is to be ascertained from the 'clear and explicit' language of the contract, and if possible, from the writing alone. [Citations.] Unless given some special meaning by the parties, the words of a contract are to be understood in their 'ordinary and popular sense,' focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 247-248.) We review the court's interpretation and application of the indemnity provision de novo. (*McCrary, supra,* 133 Cal.App.4th at p. 1535.)

As it did in the trial court, Apex characterizes paragraph 15 as a "general indemnity agreement" and argues Gap's active negligence in the *Otero* case bars Gap from recovering indemnification. (See *McCrary, supra,* 133 Cal.App.4th at pp. 1538, 1540-1541.) The problem with this argument is it is premised solely on the first sentence of paragraph 15, which requires Apex to indemnify Gap for claims arising out of services rendered by Apex, whether the claims are based on Apex's negligence or otherwise. The second sentence of paragraph 15 provides that Apex has no indemnity obligation for claims arising out of Gap's negligence.

Read together, these two sentences require Apex to indemnify Gap for claims arising out of Apex's services, but not for claims arising out of Gap's own negligence. (See *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1822 [contractual indemnity language did not obligate employer to indemnify crane owner for its own negligence].) The court did not, as Apex contends, improperly focus on the "net effect of the two sentences." Civil Code section 1641 — which applies to

indemnity contracts — requires that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (See *Rideau v. Stewart Title of California, Inc.* (2015) 235 Cal.App.4th 1286, 1294 (*Rideau*).)

"A general indemnity agreement is one that *does not address* and is silent with respect to the issue of the indemnitee's negligence." (*Ralph M. Parsons Co. v. Combustion Equipment Associates, Inc.* (1985) 172 Cal.App.3d 211, 220, italics added.) Here, the indemnity agreement is not silent regarding Gap's negligence — paragraph 15 specifically addresses Gap's negligence and requires Gap to indemnify Apex from liability caused by Gap's negligence. Because paragraph 15 "address[es] itself to the issue of the indemnitee's negligence," it is not a general indemnity clause. (*Oltmans Construction Co. v. Bayside Interiors, Inc.* (2017) 10 Cal.App.5th 355, 363; *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc.* (2007) 156 Cal.App.4th 1448, 1467, fn. 4 [indemnity clause excluded indemnitee's negligence and was "plainly *not* a general indemnity agreement"].) As a result, the court properly determined Apex must indemnify Gap for defense and indemnity costs it incurred in the *Otero* case, less any apportionment against Gap for its own negligence. (*Parsons*, at p. 220.)

II.

The Contract Does Not Authorize an Award of Attorney Fees and Costs Gap Incurred in the Travelers Action

As stated above, paragraph 15 requires Apex to "indemnify and hold [Gap] . . . harmless from any liability, loss, cost, damage or expense, *including attorneys' fees*, which [Gap] may suffer or incur as a result of any claims that arise out of or result from the rendering of services by [Apex] . . . under this Agreement . . . ." The trial court determined this language "includes Gap's claim against Travelers for insurance coverage. The . . . contract does not limit the type of claims for which indemnification applies, nor does the . . . contract require that the claims for which indemnification apply are limited only to claims brought against Gap." Gap's entitlement to attorney fees under the

contract is a question of law we review independently. (*McCrary, supra,* 133 Cal.App.4th at p. 1535; *Rideau, supra,* 235 Cal.App.4th at p. 1295.)

Apex argues the contract does not authorize an award of attorney fees and costs Gap incurred in the Travelers action. We agree. "Whether [an indemnitee] is entitled to recover attorney fees incurred in enforcing the indemnity agreement, as opposed to recovering attorney fees incurred in defending the underlying claims, depends on the language of the contract." (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 508 (*Continental*).) The general rule is " '[a] provision including attorney fees as an item of loss in an indemnity clause is not a provision for attorney fees in an action to enforce the contract.' " (*Otis Elevator Co. v. Toda Construction* (1994) 27 Cal.App.4th 559, 564 (*Otis*).) A corollary of this rule is attorney fees "are not available in the prosecution of an indemnity action absent clear language in the indemnity agreement stating the parties contemplated an award of fees for *enforcing* the agreement." (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 224-225 (*Torres*), italics added; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 971 ["[a] provision including attorney fees as an item of loss in an indemnity clause is not a provision for attorney fees in an action to enforce the contract"].)

Two cases support the conclusion that Gap is not entitled to recover attorney fees and costs incurred in the declaratory relief action against Travelers. (*Otis, supra,* 27 Cal.App.4th at p. 566; *Hillman v. Leland E. Burns, Inc.* (1989) 209 Cal.App.3d 860, 870 (*Hillman*).) In *Hillman*, the contract provided the indemnitor would indemnify " 'against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work.' " (*Hillman,* at p. 865) The *Hillman* court determined the indemnification provision did not entitle the indemnitee to attorney fees on appeal and held "there is no right to attorney fees on an appeal establishing the right to indemnity, unless the indemnity agreement specifically includes an attorney fees provision for a prevailing party in actions under the agreement." (*Id.* at pp. 869, 870.)

In *Otis*, the subcontract between the parties provided indemnity for " 'all liability, . . . costs, fees, losses, damages, expenses, causes of action, claims, suits, settlements, awards and judgments (including reasonable attorney's fees) resulting from injury or death sustained by any person . . . which injury, death or damage arises out of, or is in any way connected with, or incidental to the performance of the work under this Subcontract.' " The *Otis* court rejected the argument that the indemnity provision covered attorney fees incurred in litigating the indemnity claim, as the "subcontract permits recovery of expenses, including attorney fees, incurred in defense of any third party claims arising out of [the indemnitor's] performance of the work promised in the subcontract. . . . The provision does not specifically state . . . that [the indemnitee] would be entitled to such fees in an action to enforce the *indemnity* provision of the subcontract." (*Otis, supra,* 27 Cal.App.4th at p. 564.) *Otis* held that "[b]ecause the indemnity agreement at issue here did not explicitly provide for attorney fees incurred in pursuing an indemnity claim against [the indemnitor], [the indemnitee] was not entitled to them. The attorney fee award must therefore be amended to reflect only those fees incurred in the [underlying third party] personal injury action." (*Id.* at p. 566.)

Here, the language in paragraph 15 is similar to *Hillman* and *Otis*. It contemplates an award of attorney fees incurred by Gap in defending the *Otero* case, not in suing Travelers to *enforce* the indemnity agreement. The paragraph contains no language "stating the parties contemplated an award of fees for *enforcing* the agreement." (*Torres, supra,* 154 Cal.App.4th at p. 225, italics added.) Under the authority discussed above, paragraph 15 does not authorize an award of attorney fees and costs incurred by Gap in prosecuting the declaratory relief action against Travelers. (See *Continental, supra,* 53 Cal.App.4th at pp. 508-509 [indemnitee *not* entitled to attorney fees in prosecuting action for breach of indemnity agreement where the contract authorized attorney fees which " 'arise[ ] out of or is in any way connected with the performance of work under this Subcontract' "].)

Gap argues the attorney fees and costs incurred in the Travelers action "*arise out of or result from* the rendering of services by [Apex]" (italics added) based on an

attenuated "series of cause and effect events": Apex was providing transportation services to Gap when Apex's employee was injured, Apex's employee sued Gap, and Gap tendered the *Otero* case to Apex and Travelers. When they refused Gap's tender, Gap was forced to file an action against Travelers to establish its rights to a defense and indemnification. This argument has superficial appeal, but it ignores the authority cited above and relies on *De Witt v. Western Pacific R. Co.* (9th Cir. 1983) 719 F.2d 1448, which California courts have declined to follow. (See, e.g., *Jacobus v. Krambo Corp.* (2000) 78 Cal.App.4th 1096, 1105.)

Paragraph 15 does "not explicitly provide for attorney fees incurred in pursuing an indemnity claim" and, as a result, Gap "was not entitled" to attorney fees and costs incurred in the Travelers action. (*Otis, supra,* 27 Cal.App.4th at p. 566.)

DISPOSITION

The portion of the judgment awarding Gap $25,914.76 in attorney fees and costs is reversed. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal. (Cal. Rules of Court, rule 8.278.)

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Jones, P. J.

We concur:

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Needham, J.

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Bruiniers, J.

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