

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 1

WCC No. 2008-2125

H&D INVESTMENTS, LLC

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

ENZO CONSTRUCTION, INC.

Uninsured Employer.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner contracted with Enzo Construction, Inc. to perform and oversee construction and remodel work on a condominium. During the performance of this work, one of Enzo's employees was injured. Enzo was not carrying workers' compensation insurance at the time and the UEF accepted liability and paid benefits. The UEF then sought reimbursement from Petitioner for the benefits paid. The UEF contends Petitioner is liable for reimbursement either pursuant to § 39-71-405(1), MCA, or § 39-71-405(3), MCA, or under a theory of "equitable reimbursement." Petitioner moves for summary judgment regarding the UEF's claim for reimbursement.

Held: Petitioner's motion for summary judgment is granted. Section 39-71-405(1), MCA, provides any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses "from the contractor primarily liable." In its response brief, the UEF concedes that Petitioner is *not* the contractor primarily liable. Therefore, the UEF cannot pursue reimbursement from Petitioner under this subsection. The UEF's construction of § 39-71-405(3), MCA, is wholly unsupported by the plain language of the statute itself and does not support a claim for reimbursement against Petitioner. As for the UEF's claim for "equitable reimbursement," while the authority

upon which the UEF relies may support a claim for reimbursement against Enzo as the injured worker's employer, it does not support a reimbursement claim against Petitioner.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-506. In order for the UEF to seek reimbursement for benefits paid from an uninsured employer, it must follow the procedure set forth in § 39-71-506, MCA, including the due process requirements of § 39-71-2401(2)-(3), MCA, which that statute requires. While the UEF argues that Petitioner may only be entitled to partial summary judgment because the UEF wishes to pursue recovery against another alleged uninsured employer which has been named as a respondent in this case, the Court concludes the only issue properly before it involves Petitioner and the UEF.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-405. Where the UEF concedes that Petitioner is not the "contractor primarily liable," it cannot pursue reimbursement of benefits paid from Petitioner under § 39-71-405(1), MCA.

Employers: Statutory Employers. Where the UEF concedes that Petitioner is not the "contractor primarily liable," it cannot pursue reimbursement of benefits paid from Petitioner under § 39-71-405(1), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-405. The owner of a commercial condominium who hired a contractor to remodel the unit is not liable under § 39-71-405(3), MCA, to the UEF for an employee of the contractor who was injured within the course and scope of her employment.

Equity: Equitable Reimbursement. If an equitable obligation for reimbursement of the UEF for benefits paid to an injured worker exists, it exists against the uninsured employer.

¶ 1 Petitioner H&D Investments, LLC, moves this Court for summary judgment in its favor pursuant to ARM 24.5.329.¹ Respondent Uninsured Employers' Fund (UEF) objects

¹ H&D Investments, LLC's Motion for Summary Judgment and Brief in Support Thereof, Docket Item No. 19.

to Petitioner's motion.² The parties have filed stipulated facts and a joint request for the Court to decide this case on briefs.³

¶ 2 Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists. However, summary judgment is proper if the facts material to the motion are undisputed and entitle the party to summary judgment.⁴ In the present case, no material facts are in dispute and therefore I conclude summary judgment is appropriate.

¶ 3 The material facts, taken from the parties' Stipulated Facts,⁵ are as follows:

¶ 3a Petitioner is a single-member, member-managed limited liability company organized and in good standing under the laws of the state of Montana. Petitioner organized under Montana law on July 23, 2007. The sole member of Petitioner is the Schweitzer Family Trust, Howard Schweitzer and Deidra Schweitzer, Trustees.

¶ 3b Pursuant to Petitioner's Operating Agreement, it was formed for the purposes of engaging in the business of owning, operating, and managing real property and other assets, and such other purposes as may be permitted under Montana law.

¶ 3c Since August 15, 2007, Petitioner has owned a commercial condominium in Big Sky, Montana, more particularly described as follows:

Unit 6 of Westfork Plaza Condominiums, located on Lot 2 of Amended Subdivision Plat of Lots 1 and 2 in Block 2 of Westfork Meadows Subdivision, located in the NE 1/4 of Section 2, Township 7 South, Range 3 East, P.M.M., Gallatin County, Montana. [Plat I-37-D] Together with an undivided 9.62 percentage of interest in the common elements of the condominium appertaining to such unit, the Declaration for which was recorded May 3, 2004, as Document No. 2148719,

² Uninsured Employers' Fund Response Brief to Petitioner's Motion for Summary Judgment ("UEF's Response Brief"), Docket Item No. 23.

³ Joint Request to Vacate Hearing and Issue Briefing Schedule Based on Agreed Stipulation of Pleadings, Issues, and Facts ("Stipulated Facts"), Docket Item No. 14.

⁴ *Sandru v. Rochdale Ins. Co.*, 2004 MTWCC 49, ¶ 14 (citations omitted).

⁵ See Stipulated Facts at 2-5.

records of Gallatin County, Montana. The use of this condominium shall be used for commercial purposes only (the "Condominium").

¶ 3d Petitioner was formed with the purpose of acquiring the Condominium.

¶ 3e On October 2, 2007, Petitioner entered into a Lease Agreement with Hiking in Heels, LLC, which operates a beauty spa and boutique from the Condominium. The sole member of Hiking in Heels is Erica Schweitzer, the daughter of Howard Schweitzer and Deidra Schweitzer.

¶ 3f Pursuant to the Lease Agreement, Hiking in Heels is fully responsible for all maintenance and repairs required to the Condominium.

¶ 3g On August 15, 2007, Petitioner contracted with Enzo Construction (Enzo) to perform and oversee construction and remodel work on the Condominium (the "Project").

¶ 3h Pursuant to the Contractor Agreement, Enzo was an independent contractor with regard to the work performed for Petitioner on the Project.

¶ 3i Enzo was the general contractor on the Project.

¶ 3j Pursuant to the August 15, 2007, Contractor Agreement, Enzo was required to carry workers' compensation coverage during the course of the Project and name Petitioner as an additional named insured. The Contractor Agreement also directed that Enzo provide Petitioner a certificate of workers' compensation coverage, which names Petitioner as an additional named insured.

¶ 3k As part of Enzo's work on the Project, Enzo, through itself or subcontractors, demolished and removed materials from the Condominium, constructed weight-bearing support for the second story of the Condominium, added 180 square feet of floor space to the Condominium, framed in an office and bathroom, sheetrocked and painted the Condominium, provided HVAC services, plumbing services, and electrical services, and installed trim, flooring, doors, counters, and other fixtures such as lighting.

¶ 3l On November 29, 2007, Cameron Marlin was involved in a single-vehicle accident arising out of and in the course of employment with Enzo in Gallatin County, Montana.

¶ 3m On November 29, 2007, Enzo was not enrolled under Compensation Plan Nos. 1, 2, or 3 under the Montana Workers' Compensation Act (WCA).

¶ 3n At certain times during the project, Enzo was enrolled under Compensation Plan No. 3. Enzo's workers' compensation coverage was cancelled on November 20, 2007.

¶ 3o On November 29, 2007, Enzo was an "uninsured employer" within the meaning of § 39-71-501, MCA (2007).

¶ 3p On November 29, 2007, Petitioner was not enrolled under Compensation Plan Nos. 1, 2, or 3 under the WCA.

¶ 3q Petitioner is an "employer" as defined by § 39-71-117, MCA, and does not have an employer/employee relationship with any individuals to whom it owes a duty of coverage.

¶ 3r Petitioner is not an "uninsured employer" as that term is defined in § 39-71-501, MCA.

¶ 3s The UEF received Marlin's November 29, 2007, industrial injury claim and accepted the claim and began paying all benefits with a full reservation of rights on February 6, 2008.

¶ 3t On February 6, 2008, UEF tendered Marlin's claim to Petitioner under the guidelines of § 39-71-405(1), MCA.

¶ 3u Petitioner never purchased or provided any tools, materials, or equipment for the Project nor did it enter into any subcontracts for the Project.

¶ 3v Petitioner has never owned any real property other than the Condominium.

¶ 3w Petitioner did not perform any construction work on the Condominium.

¶ 3x Petitioner does not hold itself out to be a construction contractor.

¶ 3y Petitioner has not, and is not, registered as a contractor with the Montana Department of Labor and Industry.

¶ 3z Other than Enzo, Petitioner has not hired out, or contracted with, any contractors, subcontractors, or material or equipment suppliers to perform construction work on the Condominium.

¶ 3aa Petitioner has never been in the business of construction nor has it ever performed any construction work.

¶ 3bb Petitioner has not leased or offered to lease the Condominium to any party other than Hiking in Heels.

¶ 3cc From February 2008 through the submission of the parties' stipulated facts, Hiking in Heels has operated a beauty spa and boutique from the Condominium.

¶ 3dd Prior to November 29, 2007, Petitioner did not receive notice that Enzo's workers' compensation insurance was going to lapse, or had lapsed.

¶ 4 In its response to the petition for hearing filed in this matter, the UEF asks this Court to find Petitioner liable for Marlin's November 29, 2007, industrial injury, and to order Petitioner to indemnify the UEF for all benefits paid or payable by the UEF to Marlin. Alternatively, in the event that the Court determines that Petitioner is not liable, the UEF asks the Court to find Enzo liable and order it to indemnify the UEF for all benefits paid or payable by the UEF to Marlin. In its response to Petitioner's summary judgment motion, the UEF argues that if this Court were to grant Petitioner's motion for summary judgment, it could grant only partial summary judgment in this case as the UEF has requested additional relief not covered by Petitioner's summary judgment motion. As I recently held in *Raymond v. UEF*,⁶ in order for the UEF to seek reimbursement for benefits paid from an uninsured employer, the UEF must follow the procedure set forth in § 39-71-506, MCA. Since it is apparent that the UEF has not done so in this case, it has not satisfied the due process requirements of § 39-71-2401(2)-(3), MCA, which are required under § 39-71-506, MCA. Therefore, the only issue properly before the Court is whether Petitioner is liable to the UEF for the UEF's payment of benefits to Marlin.

¶ 5 In its brief in support of summary judgment, Petitioner asserts that the UEF has pursued reimbursement of its payments to Marlin under several different theories.⁷ In its brief in response to Petitioner's motion, the UEF sets forth several arguments in favor of Petitioner's liability for reimbursing the UEF for Marlin's benefits. UEF first alleges that it

⁶ *Raymond*, 2008 MTWCC 45 (*motion for reconsideration denied*, 2008 MTWCC 52).

⁷ In its response brief, the UEF conceded that it has no applicable remedy under § 39-71-504, MCA, and therefore that issue will not be discussed in this Order.

may make a claim for reimbursement under § 39-71-405(1), MCA. Section 39-71-405(1), MCA, states:

An employer who contracts with an independent contractor to have work performed of a kind which is a regular or a recurrent part of the work of the trade, business, occupation, or profession of such employer is liable for the payment of benefits under this chapter to the employees of the contractor if the contractor has not properly complied with the coverage requirements of the Workers' Compensation Act. Any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses from the contractor primarily liable therein.

¶ 6 The UEF argues that the renovation work for which Petitioner contracted with Enzo was a regular part of its business as the owner and manager of a commercial rental property, and that as such, Petitioner should be liable to the UEF for benefits. Petitioner focuses its attention on the last sentence of the subsection, and argues that since the UEF is not an insurer, it may not avail itself of § 39-71-405(1), MCA, as it is not an *insurer* who became liable. Petitioner argues that the UEF has often argued, to its benefit, that it is not an insurer, and that this Court has held that the UEF cannot be held liable for the payment of attorney fees pursuant to §§ 39-71-611, -612, MCA, nor a penalty pursuant to § 39-71-2907, MCA.

¶ 7 Petitioner's argument that the UEF cannot pick and choose to be considered an insurer depending on the situation is compelling. However, assuming *arguendo* that the UEF could be considered an insurer for purposes of this statute, the UEF's position remains untenable in the present case. Section 39-71-405(1), MCA, provides any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses "from the contractor primarily liable." In its response brief, the UEF concedes that Petitioner is *not* the contractor primarily liable.⁸ Therefore, by the UEF's own admission, it cannot pursue reimbursement from Petitioner under this subsection. Petitioner is therefore not liable for reimbursement to the UEF under § 39-71-405(1), MCA.

¶ 8 The UEF argues alternatively that Petitioner is liable for reimbursement under § 39-71-405(3), MCA. This subsection states:

Where an employer contracts any work to be done, wholly or in part for the employer, by an independent contractor, where the work so contracted to be

⁸ UEF's Response Brief at 5.

done is casual employment as to such employer, then the contractor shall become the employer for the purposes of this chapter.

To clarify this subsection's application to the present case, I have substituted the actual parties into the subsection as follows:

Where H&D Investments, contracts remodeling to be done, wholly for H&D Investments, by Enzo Construction, where the work so contracted is casual employment as to H&D Investments, then Enzo Construction shall become the employer for the purposes of this chapter.

¶ 9 As best I can understand the UEF's argument, it asserts that the remodeling work was **not** casual employment for Petitioner; therefore, Enzo is **not** the employer for purposes of this chapter. The UEF then makes the unsupported leap of asking the Court to conclude that since – according to the UEF – Enzo is not the employer, Petitioner must be. However, when interpreting a statute, the Court's task, is “simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”⁹ The UEF's construction of § 39-71-405(3), MCA, is wholly unsupported by the plain language of the statute itself. Petitioner is therefore not liable for reimbursement to the UEF under § 39-71-405(3), MCA.

¶ 10 Finally, the UEF argues that it is entitled to reimbursement from Petitioner under a theory of “equitable reimbursement.” The UEF relies on *Daenzer v. State Compens. Ins. Fund*¹⁰ in support of its argument. In *Daenzer*, the petitioner was the owner of a small logging company who was the employer of the injured worker.¹¹ Relying on previous case law, this Court stated, “One who is required to pay on obligation properly and primarily owed by another is entitled to indemnification from the other.”¹² The Court further noted in *Daenzer* that the respondent State Compensation Insurance Fund became secondarily liable only through the mechanism of § 39-71-405, MCA, because of “its insured's subcontractor's failure to meet his statutory responsibilities.”¹³ In the present case, if an obligation exists, the obligation to pay would be properly and primarily owed by Enzo as Marlin's employer. While the holding in *Daenzer* may support a claim for reimbursement against Enzo, it does not support a reimbursement claim against Petitioner.

⁹ § 1-2-101, MCA.

¹⁰ *Daenzer*, 1998 MTWCC 4.

¹¹ *Daenzer*, ¶¶ 7, 9.

¹² *Daenzer*, ¶ 38.

¹³ *Id.*

JUDGMENT

¶ 11 Petitioner's motion for summary judgment is **GRANTED**.

¶ 12 Petitioner is not liable to Respondent for Cameron Marlin's November 29, 2007, industrial injury.

¶ 13 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 13th day of January, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Bridget W. leFeber
Leanora O. Coles
Alanah N. Griffith
Norman L. Newhall

Submitted: November 24, 2008