**IN THE COURT OF COMMON PLEAS**
**CUYAHOGA COUNTY, OHIO**

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| **THE SHELLY CO.** | ) | **CASE NO. CV 10 739744** |
| | ) | |
| **Plaintiff,** | ) | **JUDGE JOHN P. O'DONNELL** |
| | ) | |
| **vs.** | ) | **JOURNAL ENTRY** |
| | ) | |
| **KARAS PROPERTIES, INC.** | ) | |
| | ) | |
| **Defendant.** | ) | |

***John P. O'Donnell, J.:***

This is a lawsuit by a commercial tenant against its landlord for a declaratory judgment on the parties' rights and obligations under the lease.

The tenant, plaintiff The Shelly Co., has filed a motion for summary judgment on its amended complaint and the defendant's counterclaims. The landlord, defendant Karas Properties, Inc., has opposed the motion and this entry follows.

## STATEMENT OF FACTS

Defendant Karas Properties, Inc., owns the 7.5 acres of real estate at 4900 West 150th Street, Cleveland. The property is bounded by West 150th to the east, railroad tracks to the north, and Interstate 480 to the south. The premises are bisected by a stream, a tributary to Big Creek, which runs generally southwest to northeast across the middle of the property.

The water in the stream traverses the property through two 98" by 62" underground culverts. If these culverts were not there, the property would be divided by the Big Creek's natural streambed and the rear, or western, portion of the property would be inaccessible to vehicle traffic.

Shelly's predecessor in interest, Cuyahoga Road Products, Inc., leased the premises from Karas Properties, Inc.'s predecessor in interest, Karas Brothers Co., Inc. Although the lease was not signed until March 21, 1995, CRP took possession on March 1, 1994. The evidence has not established exactly when and by whom the culverts were installed, but they did exist before CRP first occupied the property. One reason the parties know the culverts were there before then is that prior to leasing the property to CRP the defendant's predecessor rented the western portion of the premises to Karas Trucking Co., Inc., and Karas Trucking indisputably had vehicle access to that part of the land because of the culverts.

The lease includes the following provision:

> Z. **ENVIRONMENTAL ACKNOWLEDGMENT.**
>
> . . . Lessor acknowledges that it is, and will remain solely responsible for any past or future environmental violations arising or resulting solely and exclusively from Lessor's prior use or occupancy of the leased premises. Lessor shall hold Lessee harmless for any and all fines, cost of cleanup or any costs incidental to or a consequence of any environmental violations arising out of the lessor's or any or all of its predecessor's prior use or ownership of the premises, without limitation.

Because of a flood in 2007, the presence of the culverts came to the attention of the City of Cleveland around 2008. Cleveland building department officials quickly realized not only that the culverts were inadequate to handle the flow of water from a larger storm, but also that they had been installed without a permit required by the city's building code. As a result, Shelly, as lessee, and Karas Properties, Inc., as owner, were charged with violating Section 3167.05(b)(7) of the Cleveland Codified Ordinances. That law prohibits encroachment in a floodway unless a technical evaluation demonstrates that the encroachment shall not result in any increase in flood levels during the occurrence of a base flood discharge as defined by the

statute. A violation is a first degree misdemeanor. The city's position is that the lessee and owner are subject to a fine of up to $1,000 per each day the violation exists.

Upon being cited for the violation and threatened with fines of up to $365,000 per year as a party to a lease that does not expire until 2014, Shelly set about figuring out how to remedy the violation. Shelly retained the Krock Esser engineering firm and other environmental experts to prepare plans for remedial work to eliminate the impediment in the floodway. This resulted in a proposal to install a bypass box culvert above the ordinary high water mark. That design would avoid the need for additional environmental permits that would be required by the Army Corps of Engineers and other agencies for any construction below the high water mark.

Leon Karas admitted in a Civil Rule 30(B)(5) deposition that the box culvert is the least expensive solution to the current violations that would still allow access to the rear of the property. However, the defendant argues in its brief in opposition to the motion for summary judgment that preserving access is not required by the lease or the law so that the other solution is to simply remove the offending culverts and revert to the natural streambed.

Through the plaintiff's first amended complaint and the defendant's counterclaim, the parties each seek a declaratory judgment of their respective rights and obligations under the lease. In the motion for summary judgment, the plaintiff argues for a declaratory judgment that Shelly is entitled to contractual indemnity from Karas under Paragraph Z of the lease for the amounts paid to settle the criminal housing charges, for the amounts paid (or to be paid) for the remedial design and construction, and for Shelly's reasonable attorney's fees.[1]

[1] Motion for summary judgment, page 9.

## LAW AND ANALYSIS

### Is Karas obligated to indemnify Shelly under Paragraph Z of the lease?

Under the contract, Karas is required to hold Shelly harmless for damages related to "any environmental violations arising out of [Karas's] or any or all of its predecessor's prior use or ownership of the premises, without limitation."[2]

The contract does not specifically define any of the salient terms. When interpreting a contract, a court should use the plain and ordinary meaning of undefined terms unless manifest absurdity results or some other meaning is clearly intended.[3] The purpose of Chapter 3167 of the Cleveland Codified Ordinances is to minimize damages from flood conditions.[4] By that law, a flood is specifically defined as "a general and temporary condition of partial or complete inundation of normally dry land areas." The environment is the world around us, including "normally dry land areas," flood plains, floodways, and waterways. "Environmental" is an adjective that means of or relating to the environment. Because the culverts are built into the land and alter the natural creek and its surroundings there is no doubt that they are an environmental condition and, having been built without a permit required by law, they are clearly a "violation."

There is also no genuine issue of material fact about whether the culverts, as environmental violations, arose out of Karas's "prior use or ownership" of the property. Although nobody can say exactly when the culverts were built, they certainly were constructed before Shelly's tenancy, *i.e.*, by Karas or its predecessor. Because nearly half of the parcel could not be easily reached if the culverts weren't there, they were clearly intended to enhance the use and value of the premises.

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[2] Lease, p. 12, Paragraph Z.
[3] *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St. 2d 241, syllabus 2.
[4] See Section 3167.01(a).

The court therefore concludes that the culverts are "environmental violations arising out of [Karas's] or any or all of its predecessor's prior use or ownership of the premises" as contemplated by the contract. This conclusion is buttressed by the absence in the contract of any exception for pre-existing environmental violations. Because the contract doesn't have any such exception, Karas's position in its brief in opposition that the parties did not mean to include under Paragraph Z any conditions that CRP knew about when it signed the lease is unsupportable. The contract and the rest of the evidentiary record is devoid of evidence that CRP agreed that "it alone was to bear any obligations pertaining to any existing Premises (*sic*) conditions."[5]

Since there is no genuine issue of material fact about whether the culverts are environmental violations arising from Karas's prior use or ownership of the premises, Karas must hold Shelly harmless "for any and all fines, costs of cleanup or any costs incidental to or a consequence of" the violations.

**What damages can Shelly recover under Paragraph Z?**

A contract provision where one party promises to hold another harmless is an indemnity agreement. By an indemnity agreement the indemnitor (Karas) agrees to pay for covered losses incurred by the indemnitee (Shelly). Like any other contract, the parties are free to craft a narrow provision favoring the indemnitor, a broad provision favoring the indemnitee, or anything in between. Here, Karas agreed to indemnify Shelly *without limitation* for damages described as all "fines, costs of cleanup or any costs incidental to or a consequence of" the environmental violations.

Shelly claims that recoverable damages include any payments made to settle the criminal housing charges, money paid to design and get permits for the bypass box culvert to

[5] Defendant's brief in opposition to the motion for summary judgment, p. 8.

remediate the violations, money spent for the construction of the bypass box culvert, and reasonable attorney's fees.

The contract promises indemnity for consequential expense "without limitation." Anything paid to dispose of the criminal lawsuit, whether by way of a fine or settlement (as long as the settlement is less than the maximum possible fine), surely falls within the ambit of the indemnity provision. Although the provision does not refer specifically to attorney's fees, the cost and expense associated with defending the criminal lawsuit, including attorney's fees, is just as surely covered by a provision that promises to indemnify for consequential damages without limitation.

The costs to design and build a bypass box culvert to remediate the environmental violations are another matter entirely. Shelly has produced evidence unrebutted by Karas that the bypass box culvert is the cheapest way to come into compliance with the applicable environmental ordinances and offered it as the only choice. But the contract does not explicitly require Karas to fix the violations to Shelly's satisfaction, it only requires the landlord to indemnify the tenant for damages arising from the violations. Although the categories of covered damage include a criminal fine (or settlement) and the costs to defend a criminal lawsuit, as discussed above, there is a question of fact about whether "costs of cleanup" can only include the cost to bring the existing culverts into compliance while maintaining Shelly's access to the land. Shelly ignores what seems to be an obvious alternative: tearing out the culverts and returning the stream to its natural condition.[6] Even though that solution would

[6] It is true that Karas has not produced any evidence that removing the culverts is 1) a legal solution and 2) a less expensive one. As to its legality, this court would be chagrined to learn that environmental regulations have become so removed from the pragmatic world that the law prohibits returning the land to its natural state. As to the expense, common sense notwithstanding, nothing in the indemnity clause or the rest of the lease obligates Karas to using the least expensive method of curing the violations, although the contract principle of mitigation of damages obligates Shelly to seek it.

raise other contractual issues – for example, would curing the violations by tearing out the culverts, with the consequence that Shelly is cut off from nearly half the property, allow Shelly to recover the cost to relocate its facility as consequential damages? – there is a genuine issue of material fact about which remedy Karas has to pay for, especially since Shelly has yet to incur the damage, *i.e.* the cost of building the bypass box culvert. A trial is needed to decide the fix and its cost.

The same reasoning applies to the cost to date to evaluate the violations and design the bypass. Shelly initiated that process on its own, before an adjudication of Karas's obligation to pay for a complying culvert. Of course, if a trial results in a declaratory judgment that Shelly's proposal is the remedy contemplated by the contract then design costs would be included. Until then, an issue of fact remains.

To the extent Shelly has asked to recover its attorney's fees in prosecuting this lawsuit, the indemnity clause does not unambiguously cover that expense because there is a question of fact about whether the need for this lawsuit arose as a consequence of the environmental violations, in which case they are covered, or from a contract dispute, in which case they are not.

**Shelly's claims for breach of contract, unjust enrichment, negligence and common law indemnity**

Shelly has also moved for summary judgment on the rest of its affirmative claims: count one for breach of contract; count two for unjust enrichment; count four for negligence; and count five for common law indemnity.

The breach of contract claim is premised on Karas's "failure and refusal to pay all costs required to cure the preexisting environmental violation."[7] There are genuine issues of material

[7] Summary judgment motion, p. 10.

fact not only about what those costs are and whether they have been incurred, but about what cure is required under the contract and whether Shelly has ever requested indemnity to date in a specific amount, so summary judgment on this count is not warranted.

Count two for unjust enrichment seeks restitution of a benefit conferred on Karas in the event the plaintiff's contract claims fail for some reason. The merits of this claim depend on the resolution at trial of the declaratory and contract claims and summary judgment is not appropriate. On count five Shelly seeks common law indemnity "in the alternative to contractual indemnity under the Lease (*sic*)."[8] This claim is moot because the plaintiff is entitled to contractual indemnity. As to the claim for negligence at count four, Shelly has not sought summary judgment.

**Shelly's motion for summary judgment on Karas's counterclaims**

The plaintiff has also moved for summary judgment in its favor on the defendant's counterclaims. Those claims are for: breach of contract (count one); unjust enrichment (count two); indemnification (count three); and declaratory judgment.[9]

For its breach of contract claim Karas alleges that Shelly is required by the lease to undertake whatever action is necessary to correct the property's environmental violations. In support, Karas cites Paragraph D of the lease that says Shelly will "abide by all applicable" laws and "will not use the premises. . .for any unlawful purpose." Even assuming that this section applies to the culverts – a condition that existed before Shelly was on the premises – there is absolutely no evidence that Karas has been damaged by Shelly's use while an illegal condition exists, and summary judgment for Shelly is appropriate.

[8] Summary judgment motion, p. 11.
[9] The counterclaim for declaratory judgment is at pages 13 and 14 of the defendant's answer with counterclaim filed 11/29/2010. However, it is captioned, apparently incorrectly, as "**COUNT III (INDEMNIFICATION)**."

The claim for unjust enrichment is for "costs associated on [Karas's] part in an attempt to remedy the alleging (*sic*) violations."[10] Not only is there no evidence of record of what costs Karas is claiming, there is no evidence that any benefit was conferred on Shelly by Karas incurring the costs and summary judgment for Shelly is justified. Similarly, the claim for indemnification is unwarranted in law and fact.

For its own declaratory judgment claim, Karas essentially asks for a declaration opposite the one Shelly is seeking: that Shelly is obligated by the lease to indemnify Karas for all costs arising from the illegal culverts. That is not what the contract requires and the court declines to make such a declaration.

## CONCLUSION

Consistent with the foregoing analysis, the plaintiff's motion for summary declaratory judgment on count three of its amended complaint and count four of the defendant's counterclaim is granted. The court declares that the lease requires Karas to indemnify Shelly for all fines, costs of cleanup and any other costs incidental to, or a consequence of, the illegal culverts on the leased premises. Those categories of covered damages include any fine assessed against Shelly under the Cleveland Codified Ordinances[11] and the cost and expense, including attorney's fees, incurred by Shelly in defending against the building code violations alleged by the City of Cleveland. The amount of those damages will be determined at a trial. The court also declares that Karas is obligated to indemnify Shelly for any expense required to cure the environmental violations created by the illegal culverts. The appropriate cure, and the amount to effect it, will be determined at trial.

[10] Counterclaim, p. 12, ¶23.
[11] Or a settlement of a judgment for fines if the settlement is less than the fines.

Shelly's motion for summary judgment on counts one and two of its amended complaint is denied. Shelly's motion for summary judgment on count five of its amended complaint is moot. Shelly's motion for summary judgment on counts one, two and three of Karas's counterclaim is granted.

A jury trial on all pending issues of fact remains scheduled for September 12, 2011 at 10:00 a.m.

**IT IS SO ORDERED:**

_____ Date: _____
JUDGE JOHN P. O'DONNELL

**SERVICE**

A copy of this Journal Entry was sent by regular e-mail, this _____ day of September, 2011, to the following:

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