COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2016-00181

JUDITH GOWELL

vs.

DTZ, INC. f/k/a UGL SERVICES UNNICO OPERATIONS COMPANY & others[1]

MEMORDANDUM OF DECISION AND ORDER ON DEFENDANT JOYCE LANDSCAPING, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT

The plaintiff, Judith Gowell, brought this complaint alleging personal injury from icy conditions in the parking lot of a supermarket in Falmouth. The defendant owner of the supermarket, The Stop & Shop Supermarket Company, contracted with DTZ, Inc. ("DTZ") to provide snow removal services at various supermarket locations. DTZ in turn contracted with Merit Services Solutions, LLC ("Merit"), to provide snow removal services at the Falmouth store. Merit subcontracted with Joyce Landscaping, Inc. ("Joyce") to actually perform the snow removal at that site on the date of the plaintiff's injury. Joyce now moves for partial summary judgment on Merit's third-party for contractual indemnification as to the plaintiff's injuries, and on DTZ's cross-claims for contractual indemnification, breach of contract, and declaratory judgment. Joyce argues that Merit and DTZ cannot establish that an indemnification provision was included in the servicing contract Joyce agreed to with Merit, and that DTZ is not a direct party or third-party beneficiary of that contract. For the following reasons, Joyce's motion must be **ALLOWED**.

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[1] Merit Services Solutions, L.L.C. f/k/a Lipinksi Snow Services, Inc.; The Stop & Shop Supermarket Company, L.L.C.; and Joyce Landscaping, Inc.

BACKGROUND

The summary judgment record contains the following undisputed facts. Judith Gowell filed a complaint alleging that she sustained injuries on February 16, 2013, when she slipped and fell on black ice in the parking of a Stop & Shop supermarket in Falmouth. The complaint includes a negligence claim against Joyce, who performed the snow and ice removal on at the supermarket on the date of the plaintiff's alleged injuries.

Joyce's snow removal operations at the Falmouth Stop & Shop were conducted pursuant to a subcontract with Merit, then known as Lipinski Snow Services, LLC ("Lipinski"). On November 1, 2012, a Lipinski emailed Joyce to offer a contract for snow removal services at the Falmouth Stop & Shop between November 1, 2012 and May 31, 2015, stating "Here is the snow pricing for the two sites in Falmouth, MA", and noting that Joyce could "accept these right now on [Joyce's] snow portal, or sign the schedule B and send it back to [him]." The email contained three attachments, entitled: (1) "Schedule B Snow Pricing SnS Falmouth 2 sites"; (2) "Complete StopNShop Snow Packet as of 10/28/11"; and (3) "SnS 0425 Falmouth MA".

The "Complete Packet" states that it contains a Master Service Agreement ("MSA") at Schedule A, which is "a general contract" "that will remain active for a period of 3 years", to which the Schedule B "pricing sheets" are "addendums". For clarity, this Schedule A will be identified hereafter as the "2012 Email Schedule A". The "Complete Packet" also contains a generic, blank form of certification of liability insurance, requiring that Lipinski and "its client" be named as additional insureds. None of the email attachments, including the 2012 Email Schedule A and liability insurance form, contains an express indemnification, duty to defend, or hold harmless provision. In December 2012, Joyce provided an electronic acceptance of the contract through Lipinksi's online "snow portal" website. A screenshot of this acceptance

reflects only that Joyce clicked "I accept" as to the Schedule B pricing structure; no acceptance of any online master service agreement is expressly noted.

In April 2013, Lipinski began doing business as Merit, and converted the online "snow portal" to a new format. As a result, Merit can still access, but cannot print, the documents that were present on the portal at the time that Joyce provided its acceptance to the entity then known as Lipinski. In the course of this litigation, Merit has produced a different "Schedule A" created in July 2013, which identifies the contracting party as "Merit Service Solutions", not Lipinski ("2013 Schedule A"). While this 2013 Schedule A contains an indemnification, duty to defend, and hold harmless provision, Merit admits that it is different from the Schedule A in effect at the time of the plaintiff's injury. Merit also produced third, prior "Schedule A", signed by Joyce, which was in effect for Joyce's snow removal services at the Falmouth location between 2009 and 2012 ("2009 Schedule A").

In Merit's January 4, 2017 response to Joyce's request for admissions, Merit admitted that the attachments to the November 1, 2012 Lipinski email reflected the entire agreement in effect at the time of the plaintiff's alleged injury.[2] However, shortly before the hearing on the instant motion, Merit filed an affidavit seeking to reverse that position, and rely upon the 2009 Schedule A. In particular, Merit now asserts that although it cannot produce the documents that were present on the snow portal on November 1, 2012, the portal would have contained a Schedule A which was identical to the 2009 Schedule A except for the date ("2012 Portal Schedule A"). Following Merit's argument, this "missing" 2012 Portal Schedule A would therefore contain an express indemnification, duty to defend, and hold harmless provision,

[2] Approximately two months later, Merit produced a supplemental response to admissions which purported to correct this admission to a denial. However, Merit did not seek the required order of court permitting this amendment at that time. See Mass. R. Civ. P. 36(b). As such, this court will not consider the supplement.

significantly differing from the 2012 Email Schedule A sent to Joyce prior to his electronic acceptance. Joyce's motion to strike this late-produced affidavit was allowed at hearing on October 24, 2017.

DISCUSSION

A grant of summary judgment is appropriate where there are no genuine issues of material fact and the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso* v. *Comm'r of Corr.*, 390 Mass. 419, 422 (1983); *Cmty. Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). "The moving party must affirmatively show that there is no real issue of fact, all doubts being resolved against the party moving for summary judgment." *Shawmut Worcester Cnty. Bank, N.A.* v. *Miller*, 398 Mass. 273, 281 (1986) (quotation omitted). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a genuine dispute of material fact for trial either by submitting affirmative evidence negating an essential element of the non-moving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *Gen. Motors Corp.*, 410 Mass. 706, 716 (1991). It is necessary, however, for the summary judgment movant "to show by credible evidence from . . . affidavits and other supporting materials that there is no genuine issue of material fact and that [the party is] entitled, as matter of law, to a judgment." *Smith* v. *Massimiano*, 414 Mass. 81, 85 (1993) (citations omitted).

In light of the allowance of Joyce's motion to strike Merit's affidavit, the record is left merely with Merit's interrogatory admission that the attachments to the November 1, 2012 Lipinski email reflected the entire agreement in effect between Lipinski and Joyce at the time of

the plaintiff's alleged injury. The first page of the Complete Packet identifies the Master Services Agreement to which it refers as "Schedule A", unambiguously referencing the 2012 Email Schedule A, not any other MSA. See *Bank* v. *Thermo Elemental Inc.*, 451 Mass. 638, 648 (2008) (contract language is unambiguous unless "phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken."). The Lipinski email attachments represent a fully integrated agreement, despite the lack of an express integration clause: Lipinski itself named the "*Complete*" Packet attachment, indicating it was a final embodiment of the terms of the agreement; the attachments contain all of the essential terms of the agreement, including the pricing in Schedule B, the three-year term of the MSA, a description of the property to be serviced, and standards for the completion of the work; and, taken together, none of the documents are facially ambiguous. See *Hallmark Institute of Photography, Inc.* v. *Collegebound Network, LLC*, 518 F. Supp. 2d. 328, 331 (D. Mass. 2007). Accordingly, Merit cannot rely on parol evidence from depositions or the 2009 and 2013 Schedule A's to establish that both Joyce and Lipinski understood the MSA to include an indemnification provision. *Id.* The court's analysis is confined solely to the contents of the Lipinski email attachments.

None of those attachments, including the 2012 Email Schedule A, contains an express indemnification, duty to defend, or hold harmless provision. Section 7.8 of the 2012 Email Schedule A requires only that *if* Joyce were itself to further subcontract the specified snow removal, that it would obtain Lipinski's permission and remain "fully responsible for the actions of any second-tier subcontractors". It is undisputed that Joyce did not subcontract, and performed the work itself; Section 7.8 has no relevance to the indemnification of Lipinski for Joyce's own work. Moreover, the mere inclusion of a blank certification of insurance form

within the Complete Packet does not establish a duty of indemnification in the complete absence of any contractual language.

As such, Merit has no reasonable expectation of proving that the plain and unambiguous terms of the Lipinski email attachments required Joyce to indemnify Merit for claims arising out of its own completion of the specified snow removal. Where Merit cannot establish a required element of its third-party indemnification claim, Joyce is entitled to judgment as a matter of law.

Similarly, in the absence of a contractual duty for Joyce to indemnify Merit, DTZ cannot establish that Joyce had a duty to indemnify it either. Joyce was never a party to any contract with DTZ, and the 2012 Email Schedule A makes no reference to any indemnification of DTZ. Thus, DTZ has no reasonable expectation of proving that Joyce breached any contract in which DTZ is a party or third-party beneficiary. For that same reason, DTZ has no reasonable expectation of prevailing on its cross-claim for declaratory judgment that the Lipinski MSA contained insurance and indemnification provisions, Joyce's duty to defend, indemnify and pay DTZ's attorney's fees, and that Joyce's failure to do so was unfair and deceptive under Chapters 93A and 176D.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant Joyce Landscaping, Inc.'s Motion for Partial Summary Judgment be **ALLOWED** as to **Count I** of Merit Service Solutions, LLC's Third-Party Complaint, and **Counts VI-VII** of DTZ, Inc.'s Cross-Claim.

Robert C. Rufo
Justice of the Superior Court

Dated: November 9, 2017

A true copy, Attest: Scott W. Nickerson
Clerk