IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MEYER NATURAL FOODS, LLC, and CRUM AND FORSTER SPECIALTY INSURANCE COMPANY,	)	Case No. CI 14-3329
Plaintiffs,	)	**ORDER ON PLAINTIFFS AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S AMENDED RENEWED MOTION FOR SUMMARY JUDGMENT**
v.	)	
GREATER OMAHA PACKING CO., INC.,	)	
Defendant.	)	

This matter comes before the Court on the Amended Motion for Partial Summary Judgment of Plaintiffs, Meyer Natural Foods, L.L.C. ("MNF"), and Crum and Forster Specialty Insurance Company ("Crum"), filed on May 16, 2017 and the Amended Renewed Motion for Summary Judgment of Defendant, Greater Omaha Packing Co. ("GOPAC"), Inc., filed on September 15, 2017. Briefs were submitted to the Court. A hearing was held on Plaintiffs Amended Motion for Partial Summary Judgment on June 5, 2017, during which time arguments were heard and evidence adduced. A hearing was held on Defendant's Amended Renewed Motion for Summary Judgment on December 15, 2017, during which time arguments were heard and evidence adduced. The matter was taken under advisement. Being fully advised, the Court finds and orders as follows:

FACTS

On April 27, 2006, MNF and GOPAC entered into a Processing Agreement ("Agreement"), attached as Exhibit A to the Second Amended Complaint ("SAC"), which was amended on May 17, 2006, attached as Exhibit B to the SAC, whereby GOPAC would slaughter

MNF's cattle, process the beef, and fabricate the same into various beef products. GOPAC harvested and processed beef for MNF one day a week for five years, until May of 2011. (Fili Dep., at 301:8-22).

On or about April 25, 2011, MNF delivered various cattle to GOPAC for slaughter, processing and fabrication pursuant to and consistent with the Agreement. (SAC ¶ 7). On April 25, 2011, GOPAC slaughtered the cattle delivered by MNF to GOPAC. (SAC ¶ 7). The Agreement required GOPAC to test the beef for E. coli O157:H7. (SAC, Attach. Ex. A; Amended Aff. of Daniel Nealon). On April 27, 2011, after processing the beef for MNF but before delivery, GOPAC took various samples from the beef to be analyzed and evaluated to determine whether the beef contained impermissible pathogens, including E. coli O157:H7 (SAC ¶ 7). An independent laboratory found that the samples resulted in 37 presumptive positive findings of the presence of E. coli O157:H7. (SAC ¶ 7). The 37 presumptive positive samples indicated that GOPAC had processed a substantial portion of MNF's beef which was, at the time of the sampling, contaminated with E. coli O157:H7. (SAC ¶ 7).

On April 28, 2011, GOPAC met with MNF and explained that 37 combos of beef tested presumptive positive for E. coli O157:H7. (Carlson Depo. 106:13-108:22, 112:2-11). During that meeting, GOPAC told MNF that, due to the fact that more than five percent of the processed beef tested positive for E. coli, an "event day" had occurred. (Carlson Depo. 99:20-101:11. 109:15-110:18, 125:8-19). An event day being a day in which there is a very high percentage of presumptive positive findings for E. coli. (Carlson Aff. ¶ 41). MNF subsequently put a hold on the meat; outgoing meat truckers were contacted and instructed to return the loaded trucks to MNF's Skylark facility. (Carlson Depo. 113:10-115:10; Depo. of Dan Nealon 49:20-23). The beef that had tested presumptive positive for E. coli O157:H7 was either sent to a cooker so that the product

could ultimately be sold at a reduced charge or transported to a landfill, since it was altogether unsafe for human consumption. (Carlson Dep. 120:14-121:11; Depo. of Dan Nealon 40:3-41:12, 42:3-12, 51:19-53:4). With regards to trim combos that were found to have presumptive positive findings for E. coli O157:H7, MNF made the arrangements for having such products cooked and, furthermore, undertook the necessary steps to mitigate the damages sustained by MFN. (Carlson Aff. ¶ 5).

On March 14, 2017, Plaintiffs filed their Second Amended Complaint alleging breach of contract (Counts I and II), breach of warranty (Count III), breach of an indemnity obligation (Count IV), failure to obtain insurance (Count V), and breach of the Guarantee (Count VI). On May 16, 2017, Plaintiffs filed an Amended Motion for Partial Summary Judgment requesting the Court find that Defendant failed to obtain and maintain "property insurance" on the value of MNF property, Count V of the SAC. In support of their Motion, Plaintiffs offered exhibits 1-4, which were received. In opposition to Plaintiffs Motion, Defendant offered Exhibits 5-6, which were received, and the Court took judicial notice of the Second Amended Complaint and Answer. On September 15, 2017, Defendant filed an Amended Renewed Motion for Summary Judgment requesting the Court find no genuine issue of any material fact exists and Defendant is entitled to judgment as a matter of law. In support of their Motion, Defendant offered exhibits 79, 308, 313-315, 142, 332-334, 95, 301, 335, 120-126, and 328-329, which were received. In opposition to Defendant's Motion, Plaintiffs offered exhibits 1-4, 12, 13-119, 127-143, 301-312, 313-326, 330-331, and 327, all exhibits not objected to were received. Defendant objected to exhibits 140, 141, 330-331, and 327. For the limited purpose of this Motion, the Court will receive the exhibits, however, the Court will disregard portions containing hearsay and legal determinations.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, thus entitling the movant to judgment as a matter of law. *Peterson v. Homesite Indem. Co.*, 287 Neb. 48, 50, 840 N.W.2d 885, 888-89 (2013). It is the movant's burden to produce sufficient evidence to demonstrate that there are no genuine issues of material fact. *Selma Dev., L.L.C. v. Great W. Bank*, 285 Neb. 37, 45, 825 N.W.2d 215, 222 (2013). After the movant makes a prima facie case by producing enough evidence to demonstrate it would be entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact preventing judgment shifts to the party opposing the motion. *Id.*

On a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party and gives that party the benefit of all reasonable inferences deducible from the evidence. *Doe v. Fireman's Fund Ins. Co.*, 287 Neb. 486, 489, 843 N.W.2d 639, 642 (2014). In reviewing the motion, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Estate of Donahue ex rel. Brown v. WEL-Life At Papillion, Inc.*, 19 Neb. App. 158, 162, 810 N.W.2d 418, 423 (2011). It is fundamental that the purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. *Frazier, Inc. v. 20th Century Builders, Inc.*, 188 Neb. 618, 198 N.W.2d 478 (1972).

ANALYSIS

I. Property Insurance on MNF Property , Count V of the SAC

Plaintiffs assert that Defendant Greater Omaha Packing Co., Inc. (hereinafter "GOPAC") failed to comply with the Processing Agreement and, more specifically, Defendant GOPAC failed to obtain and maintain property insurance on the value of the Meyer property (the beef in question). The provision at issue is located at Section 18 of the Addendum to the Processing Agreement dated May 17, 2006, which states: "Greater Omaha Packing Co., Inc. shall, during term of agreement, maintain property insurance on Meyer Natural Angus property in its possession, with a total value of $1,800,000. Additionally, Greater Omaha Packing Co., Inc. agrees to provide coverage as evidenced in the Certificate of Insurance." (*See* SAC, Attach. Ex. B).

A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 298, 702 N.W.2d 355, 366 (2005). A contract is ambiguous when a word, phrase, or provision in the contract has at least two reasonable but conflicting interpretations or meanings. *Kluver v. Deaver*, 271 Neb. 595, 599, 714 N.W.2d 1, 5 (2006). When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact which preclude summary judgment. *Id.* at 459. A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Sack Bros. v. Tri-Valley Co-op., Inc.,* 260 Neb. 312, 317, 616 N.W.2d 786, 792 (2000).

The evidence is clear that GOPAC had a property insurance policy ("Policy") with Liberty Mutual Fire Insurance Company ("Liberty Mutual"), which remained in full force and effect for the duration of the Agreement. (Fili Aff., ¶ 13). The Policy provided insurance coverage for any

non-owned personal property in GOPAC's care, custody, and control that GOPAC "agreed, prior to loss, to insure." (*See* Policy, pp. 17, 51; Struyk Aff., ¶ 18). The Policy's liability limit was $98,836,333 per occurrence. (*See* Policy, p. 15). The Addendum to Section 18 of the Agreement only required that GOPAC "maintain property insurance on Meyer Natural Angus property in its possession, with a total value of $1,800,000," which GOPAC complied with. (*See* SAC, Attach. Ex. B). Nothing in the Agreement or the Addendum required GOPAC to carry property insurance coverage for an E. coli O157:H7 contamination. (See Addendum; Fili Aff., ¶ 9). Therefore, Plaintiffs contention that Defendant failed to obtain insurance fails as a matter of law.

II. MNF's Failure to Exercise its Remedy Pursuant to the Agreement

The Court finds that Plaintiffs claims against GOPAC in Counts I, II, III, and VI fail as a matter of law due to MNF's failure to exercise the remedy provided under the Agreement for products failing to meet a specification or warranty provided by GOPAC. Section 10 of the Agreement provides:

> Meyer or its customers will have the right to inspect the furnished product upon delivery by GOP and prior to payment or acceptance to verify that the finished products conform to Meyer's specifications and have not been damaged or destroyed in transit. Meyer shall notify GOP of its non-acceptance of any of the products within twenty (20) days of delivery. If Meyer fails to so notify GOP, it will be deemed to have accepted such products as of the date of delivery; *provided, however,* that Meyer's acceptance of the products will not relieve GOP of any of its warranty obligations under this Agreement. **All products failing to meet the warranties and specifications contained in the Agreement, or shipped contrary to provisions of the related purchase order, may be rejected by Meyer for full credit and returned or held at GOP's expense and risk.** Meyer shall charge GOP its out-of-pocket expenses for storing and reshipping any products properly rejected by Meyer under this Agreement. GOP will not replace any such rejected products without written authorization from Meyer.

(SAC, Attach. Ex. A § 10). (Emphasis added).

As set forth in Section 10, upon notification from GOPAC that some of the meat processed for MNF had tested presumptively positive for the presence of E. coli O157:H7, the Agreement

provided that MNF had the right to reject the shipment from GOPAC, return the meat to GOPAC at GOPAC's expense, and demand a full credit. As stated previously, a contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 270 Neb. 286, 298, 702 N.W.2d 355, 366 (2005). Rather than pursue its contracted for remedy under the Agreement, MNF retained the beef products and the beef that had tested presumptive positive for E. coli O157:H7.

Further, Section 19 of the Agreement states:

> Termination of this Agreement by either party shall not limit or otherwise affect the remedies of the nondefaulting or nonbreaching party against the defaulting or breaching party, and the indemnification provisions contained in Section 17 shall survive any such termination and the expiration of the Agreement. In the event that either party is in material default under any of the terms or conditions of this Agreement, or has materially breached any of its representations or warranties in this Agreement, the nondefaulting or nonbreaching party shall be entitled to pursue, in addition to any remedies specifically provided herein, all further remedies then available under the applicable state Uniform Commercial Code or otherwise available at law or in equity.

(SAC, Attach. Ex. A § 19).

Pursuant to U.C.C. § 2-607(2), "Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for nonconformity." It is undisputed that despite MNF's knowledge of the presumptive positive lab results for E. coli O157:H7, MNF accepted the processed meat and had it sent to either a cooker so that the product could ultimately be sold at a reduced charge or was transported to a landfill, since it was altogether unsafe for human consumption. For the aforementioned reasons, the Court

finds that MNF failed to avail itself of its rights under the Agreement and its claims against GOPAC in Counts I, II, III, and VI fail as a matter of law.

III. Indemnification, Count IV of the SAC

The Court further finds that Plaintiffs claim against GOPAC in Count IV for indemnification fails as a matter of law. Section 16 of the Agreement provides, "GOP agrees to indemnify and defend Meyer for loss or damages to the extent caused by Greater Omaha Packing Co., Inc.'s negligence." (SAC, Attach. Ex. A § 16). MNF claims that its beef products were contaminated as a result of GOPAC's negligence; however, E. coli has historically occurred in the production of raw beef products. (Ex. 142 at p. 3). MNF has failed to present any evidence to the Court to suggest any negligence by GOPAC, therefore, MNF's indemnification claim fails as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiffs Amended Motion for Partial Summary Judgment is **denied** and Defendant's Renewed Amended Motion for Summary Judgment is **granted**, therefore, Plaintiffs Second Amended Complaint is dismissed with prejudice.

DATED this 8th day of January, 2018.

BY THE COURT:

Hon. Shelly R. Stratman
Douglas County District Court Judge

Cc: Tom Grennan
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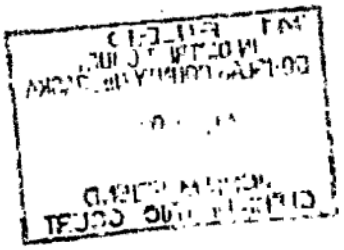

CERTIFICATE OF SERVICE

I, the undersigned, certify that on January 9, 2018 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Jordan W Adam
jadam@fraserstryker.com

Thomas A Grennan
tgrennan@grosswelch.com

Date: January 9, 2018 BY THE COURT: John M. Friend
CLERK

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

CERTIFICATE OF SERVICE

I, the undersigned, certify that on January 16, 2018 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Jordan W Adam
jadam@fraserstryker.com

Thomas A Grennan
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Date: January 16, 2018 BY THE COURT: John M. Friend
CLERK

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

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Case Caption: Meyer Natural Foods, LLC v. Greater Omaha Packing Co.,Inc.
Court of Appeals No: A-18-108
Trial Court No: CI14-3329

Dear Clerk:

We have received and filed the certified copy of notice of appeal in the above-captioned case. Please record the Court of Appeals number and use it on all future correspondence and filings.

If we can be of further assistance, please feel free to contact our office.

Very truly yours,

Terri A. Brown
Clerk

FILED BY
Clerk of the Douglas District Court
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