IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

THOMAS & BETTS CORPORATION,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	**Case No. 02-2953 Ma/A**
	)	
HOSEA PROJECT MOVERS, LLC,	)	
	)	
Defendant/Counter-Plaintiff.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This case arises from an alleged breach of contract by Defendant Hosea Project Movers, LLC ("Hosea"). Hosea contracted to provide a number of services in relocating one of Plaintiff Thomas & Betts Corporation's ("Thomas & Betts") plants from Boston, Massachusetts to Monterrey, Mexico.

Before the court is Hosea's August 10, 2007, motion for summary judgment, asking the court to decide that Hosea had no affirmative duty to obtain transport insurance. Thomas & Betts responded on September 10, 2007. For the following reasons, Hosea's motion for partial summary judgment is GRANTED.

I. Background

The central facts of this case are set out in this court's order denying Hosea's motion for reconsideration, entered on August 31, 2007:

On February 6, 2002, Thomas & Betts entered into a written contract with Hosea ("the Agreement"), in which Hosea was to assist in the transport, rigging, setup, and installation in Mexico of several 420-ton aluminum die-casting machines owned by Thomas & Betts. (Compl. ¶ 6, Dec. 12, 2002.) Pursuant to Paragraph 17 of the Agreement, Hosea was to provide insurance in Mexico for the die-casting machines. While Hosea was attempting to deliver one of the die-casting machines ("Machine No. 2") to Thomas & Betts' Monterrey, Mexico, facility, it fell from the trailer on which it was sitting and was destroyed. (Id. ¶ 7.)

Thomas & Betts informed Hosea that it intended to set off the damages from the loss of Machine No. 2 against the unpaid contract price it owed Hosea under the Agreement. (Counterclaim ¶ 22.) After Hosea denied liability for the damage to Machine No. 2, Thomas & Betts refused to make final payment under the Agreement for delivery and installation of Machine No. 2. (Id. ¶¶ 23–24.) In response, Hosea refused to deliver a second die-casting machine owned by Thomas & Betts ("Machine No. 14"). (Compl. ¶ 13.)

On December 12, 2002, Thomas & Betts filed this lawsuit, alleging breach of contract and conversion. After the complaint had been filed, Hosea delivered Machine No. 14 to Thomas & Betts' Monterrey facility and brought a counterclaim against Thomas & Betts for breach of contract in failing to pay Hosea for services performed under the Agreement. (Counterclaim ¶ 25.) Hosea also alleged that Thomas & Betts had failed to pay the balance on a prior contract ("the California account"). Thomas & Betts filed an amended complaint, alleging additional claims for fraudulent inducement and intentional misrepresentation, as well as a claim for violation of the Tennessee Consumer Protection Act (the "TCPA"). According to Paragraph 21 of the Agreement, all claims for breach of the Agreement are governed by Tennessee law.

On October 19, 2005, the court entered an order granting partial summary judgment in favor of Thomas & Betts. (Order Granting Pl.'s Mot. Recons. and Denying In Part and Granting in Part Pl.'s Mot. Summ. J., Oct. 19, 2005, Dkt. 208.) Without making

a determination about damages or about the materiality of the breach, the court found that Hosea had breached the Agreement by failing to provide any insurance in Mexico for the die-casting machines.

On October 25, 2005, the matter went to trial. At the close of the evidence, the court granted Hosea's motion for judgment as a matter of law on Thomas & Betts' claims for fraudulent inducement, fraudulent misrepresentation, and fraudulent concealment, and its claim under the TCPA.

On November 3, 2005, the jury returned a verdict. As to Thomas & Betts' claims for conversion and for breach of contract based on the destruction of Machine No. 2 and the delayed delivery of Machine No. 14, the jury found for Hosea. As to Thomas & Betts' claim for breach of contract based on Hosea's failure to provide the required insurance, the jury awarded Thomas & Betts damages of $87,500. As to Hosea's counterclaims for breach of contract, the jury found in favor of Hosea. It awarded Hosea $127,191, plus 10% interest per year, for breach of the Agreement, and additional damages for breach of contract as to the California account.

Both parties filed post-judgement motions. Thomas & Betts filed a motion for judgment as a matter of law and, in the alternative, motion for new trial, on November 28, 2005. On November 30, 2005, Hosea filed a motion for judgment as a matter of law and a motion to alter or amend order on jury verdict. Pursuant to its order (Order on Pending Motions, Sept. 28, 2006 (the "Order"), Dkt. 271), the court granted in part and denied in part Thomas & Betts' motion, and denied all of Hosea's post-judgment motions. The court ordered a new trial on all claims and counterclaims for breach of the Agreement.

In its motion for new trial, Thomas & Betts asserted that the jury's inconsistent verdicts required the court to enter judgment as a matter of law in favor of Thomas & Betts, or to order a new trial. In the Order, the court cited Santa Barbara Capital Corp. v. World Christian Radio Found., Inc., 491 S.W.2d 852, 857 (Tenn. Ct. App. 1972) (quoted in John P. Saad & Sons, Inc. v. Nashville Thermal

> Transfer Corp., 715 S.W.2d 41, 47 (Tenn. 1986)), for the proposition that there can be no recovery for damages on the theory of breach of contract by the party who committed the first uncured material breach of the contract and sought damages for the other party's subsequent material breach. Thomas & Betts argued that, because the jury had awarded damages for breach of the Agreement to both parties, the jury's special verdicts were inconsistent and therefore, constitute a clear error of law. Arguing that the evidence showed that Hosea committed the first material breach, Thomas & Betts asked the court to enter judgment as a matter of law for Thomas & Betts only, or to order a new trial because of the inconsistent verdicts.
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> * * *
>
> Reading Tennessee law to forbid a party who is liable for the first uncured material breach of an agreement to recover damages for a later material breach by the other party, the court found that the jury's verdict awarding damages to both parties for breach of the Agreement was inconsistent. Because it could not know whether the jury had found Hosea's breach to be material, the court declined to enter judgment in favor of Thomas & Betts and ordered a new trial as the only appropriate remedy. Because all of the parties' claims for breach of the Agreement are interwoven, the court ordered a new trial on all claims made by both parties.

(Order Denying Def.'s Mot. for Reconsideration at 2-9.)

The contract contains three references to insurance. The first is in Paragraph Two, which provides as follows:

> 2. Purchase Price. The purchase price of $727,191 ("Purchase Price"), as quoted in the Proposal, shall include:
>
> 2.1 all rigging, millwright, electrical and mechanical services;
>
> 2.2 all applicable boxing, packing, freight and shipping charges;
>
> 2.3 applicable duty and transport insurance costs; and

> 2.4 setup and installation at Purchaser's facility;

("Rigging, Millwright, Electrical & Mechanical Purchase Agreement, (the "Contract"), Tr. Exh. 5, ¶ 2.) The second reference to insurance comes in Paragraph Seventeen:

> 17. Insurance. Seller shall at all times during the term of this Agreement maintain the following types of insurance in the following minimum amounts:
>
> A. Worker's Compensation: Statutory Limits;
>
> B. Comprehensive General Liability, including coverage for Premises/Operations, Products/Completed Operations and Contractual Liability: $2,000,000 per occurrence and in the aggregate, Bodily Injury and Property damage combined;
>
> C. Automobile Liability: Bodily Injury and Property Damage combined;
>
> D. Automobile Liability: Bodily Injury and Property Damage: $1,000,000 per occurrence.
>
> Purchaser may require that Seller, prior to commencement of any action or work or performance of services hereunder, deliver to Purchaser a Certificate of Insurance evidencing that the Seller has the above insurance in full force and effect, and naming Purchaser and Thomas & Betts Corporation as additional insureds under the above Comprehensive General Liability and Automobile Liability Policies, and containing a clause which reads as follows: "The insurance provided by these policies will not be materially changed or cancelled without 30-day prior written notice being provided to Purchaser." Purchaser, at Purchaser's cost, reserves the right to require Seller to obtain additional types of insurance coverage and/or higher coverage limits where Purchaser in its sole discretion deems same to be appropriate.

(Contract, Tr. Exh. 5, ¶ 17.) The final reference to insurance is attached to the Contract as "Exhibit A," titled "Thomas &

Betts Project Proposal Recap of Project," which is expressly incorporated into the agreement by Paragraph Twenty-Three. (Contract, Trial Exh. 5, ¶ 23, "This agreement, together with all the Exhibits attached hereto and incorporated by reference herein, constitutes the entire undertaking between the parties…."). One of the line items in Exhibit A is insurance, for which there is a corresponding charge of $17,631.00. (Id. at Exh. A.)

The motion before the court addresses whether Paragraph Two created an affirmative duty on the part of Hosea to obtain transport insurance. Hosea contends that it did not and moves for summary judgment on this issue. Thomas & Betts argues that it did and opposes the motion.

II. Jurisdiction and Applicable Law

Thomas & Betts is a Tennessee corporation with its principal place of business in Memphis, Tennessee. Hosea is a Kentucky limited liability company with its principal place of business in Newport, Kentucky. The sole member of Hosea is David S. Hosea, who is a citizen of Kentucky. Because the amount in controversy exceeds $75,000, the court has diversity jurisdiction under 28 U.S.C. § 1332.

As a diversity action, the substantive law governing this case is state rather than federal law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Under the terms of Paragraph

Twenty-One of the Agreement, claims for breach of the Agreement are governed by Tennessee law.

III. Standard of Review on Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment may be granted if the pleadings and evidence on file show that there is no genuine issue as to any material fact. LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986). The moving party can meet this burden by pointing out that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of its case. See Street v. J.T. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts establishing that there is a genuine issue for trial by showing that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The "mere existence of some alleged factual

dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Id. The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting its claims." Cloverdale Equip. Co. v. Simon Aerials, Inc., 869 F.2d 934, 937 (6th Cir. 1989). The district court does not have the duty to search the record for that evidence. See InterRoyal Corp. v. Sponseller, 889 F.2d 108, 110–11 (6th Cir. 1989). Nonmovant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in their favor. See id.

IV. Analysis

A. The Parties' Arguments

Hosea contends that Paragraph Two's language is at best ambiguous and therefore did not create an affirmative duty to purchase transport insurance. Hosea notes that Thomas & Betts' expert freely admitted that, unlike Paragraph Seventeen, Paragraph Two did not *explicitly* require it to purchase transport insurance. (Mem. in Supp. of Mot. for Summ. J.,

("Def.'s Mem."), at 4, citing Exh. A to Mem. in Supp. of Mot. for Summ. J., ("Def.'s Exh. A"), at 27.)

Hosea argues that Paragraph Two's language can be interpreted in two ways. The phrase "transport insurance costs" might require it to reimburse Thomas & Betts for the cost associated with transport insurance, i.e. the premiums. (Def.'s Mem. at 5-6.) Alternatively, the phrase could be read to impose an affirmative duty on Hosea to obtain the policy itself. (Id.) Although Thomas & Betts argues in favor of the latter interpretation, Hosea contends that the Plaintiff's expert, Michael Pera, conceded that the language was "somewhat ambiguous." (Id., quoting Def.'s Exh. A at 30.)

To support its interpretation, Hosea cites a number of factors. First, it contrasts Paragraph Two with Paragraph Seventeen, which expressly addresses insurance and explicitly creates an independent duty to maintain certain policies. (Def.'s Mem. at 6.) If it were required to obtain transport insurance, Hosea asks why the requirement was not stated in the appropriate section. Second, Hosea points to its expert, Dr. Peter Kensicki, who explains why a company in Thomas & Betts' position might prefer to obtain its own transport insurance and have the mover reimburse it: (1) the owner of the goods is the named insured, (2) the owner may directly negotiate the dollar amount of coverage, (3) covered losses are often greater for the

owner than for the carrier, and (4) owners find it easier to recover when the policy is their own. (Id.) Third, Hosea recites the closing language from Paragraph Seventeen, which states that Thomas & Betts "reserves the right to require [Hosea] to obtain additional types of insurance coverage and/or higher coverage limits where [Thomas & Betts] in its sole discretion deems same to be appropriate." (Id. at 9, quoting Contract, Tr. Exh. 5, ¶ 17.) Not only does this language provide for the possibility that Hosea might be required to obtain additional insurance, it implies that the insurance listed in Paragraph Seventeen is exhaustive. Last, Hosea notes that, although its initial project proposal provided for the purchase of a major form of transport insurance, transport insurance was not included in the final Contract. (Def.'s Mem. at 10, see also Tr. Exh. 75.) Given all of these factors, Hosea argues that it is uncertain whether Paragraph Two affirmatively required Hosea to obtain transport insurance. Hosea contends that the ambiguity must be construed in its favor because Thomas & Betts drafted the contract.

In its response, Thomas & Betts contends that Hosea is asking the court to find that its breach was not material, which is inappropriate because materiality is a question for the jury. (Opp. to Mot. for Summ. J., ("Pl.'s Opp."), at 4.) This argument is misplaced because Hosea's motion does not ask the

court to rule on the materiality of failing to provide insurance, but rather on whether it had a *duty* to provide transport insurance under the contract.

Thomas & Betts next argues that the Contract is not ambiguous and contends that Hosea's alternative understanding of "transport insurance costs" is "internally inconsistent, implausible and not supported by the facts." (Id. at 7.) Thomas & Betts refers to the deposition of Hosea's expert in which he argued that Paragraph Two of the Contract could be read to require Hosea to reimburse Thomas & Betts for the cost of transport insurance which it acquires independently. (Id. citing Exh. C to Opp. to Mot. for Summ. J., "Pl.'s Exh. C," at 50.) Beyond attacking the logic of Hosea's argument, Thomas & Betts asserts that Hosea's expert, Dr. Peter Kensicki, is not qualified to interpret the Contract or speculate about the parties' intent because he is neither a lawyer nor experienced in contracts involving moving and rigging. (Pl.'s Opp. at 8.) It refers the court to Dr. Kensicki's deposition in which he admits that he does not expect to be called as an expert witness on the *interpretation* of the Contract, but would instead "comment[] on the customs and practices of the insurance business." (Pl.'s Exh. C at 53.)

Last, Thomas & Betts suggests that Hosea mischaracterizes the effect of the purported ambiguity in the Contract. (Pl.'s

Opp. at 15.) Thomas & Betts notes that the rule requiring ambiguity to be interpreted against the drafting party is a final step in judicial interpretation, to be considered only after the court has addressed all other relevant evidence (e.g. parol evidence). (Id. at 16.) It also asserts that it was not solely responsible for drafting the Contract, but that the Contract arose out of extensive negotiations between the parties. (Id.) Thomas & Betts supports this point by reference to the preamble to the Contract and the trial testimony of a Hosea officer and of David Hosea himself. The preamble to the Contract expressly incorporates an attached Project Proposal which was "modified by Seller [Hosea]." (Contract at Preamble.) At trial, Hosea Officer Ernie Ligget testified that he was "involved in negotiating this contract with Thomas & Betts," and David Hosea conceded that "[a]ll contracts are changed and negotiated as you go along." (Exh. E to Opp. to Mot. for Summ. J. at 10; Exh. F to Opp. to Mot. for Summ. J. at 18.)[1]

B. Interpretation of Contracts Under Tennessee Law

The law governing review of contracts in Tennessee is well-established. A contract is to be reviewed "from beginning to

[1] Thomas & Betts also devotes several pages to refuting Hosea's claim that, even if Hosea had provided the type of transport insurance from its initial proposal (a motor truck cargo policy), it would not have covered the damage at issue. (Pl.'s Opp. at 10-15.) Whether the insurance policy would have covered the damage relates to the question of materiality and is not relevant to the present inquiry into whether there was a duty to provide transport insurance in the first place.

end and all its terms must pass in review, for one clause may modify, limit or illuminate another." Cocke County Bd. of Hwy. Comm'rs v. Newport Utils. Bd., 690 S.W.2d 231, 237 (Tenn. 1985). In general:

> The cardinal rule in the construction of contracts is to ascertain the intent of the parties. If the contract is plain and unambiguous, the meaning thereof is a question of law, and it is the Court's function to interpret the contract as written according to its plain terms. The language used in a contract must be taken and understood in its plain, ordinary, and popular sense…. If the language of a written instrument is unambiguous, the Court must interpret it as written rather than according to the unexpressed intention of one of the parties. Courts cannot make contracts for parties but can only enforce the contract which the parties themselves have made.

Honeycutt v. Honeycutt, 152 S.W.3d 556, 561-62 (Tenn.Ct.App. 2003) (internal citations omitted).

"Contractual language is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." Allstate Ins. Co. v. Watson, 195 S.W.3d 609, 611 (Tenn. 2006). If the language is ambiguous, courts look to extrinsic parol evidence to determine the intent of the parties. Id. Examples of such evidence includes "the contracting parties' conduct and statements regarding the disputed provision," pre-contract negotiations, party conduct during performance of the contract, and "any utterances of the parties that might shed

light upon their intentions." Id., Stephenson v. The Third Co., 2004 WL 383317, at *4 (Tenn. Ct. App. 2004).

The court must "impose a construction that is fair and reasonable." Id. That is:

> Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred.

Wilkerson v. Williams, 667 S.W.2d 72, 79 (Tenn. Ct. App. 1983).

An ambiguous contract is generally construed against the party who drafted it. Parks v. Richardson, 567 S.W.2d 465, 468 (Tenn. Ct. App. 1977), Hanover Ins. Co. v. Haney, 425 S.W.2d 590, 592-93 (Tenn. 1968). This rule aids in "resolving the question of which of two possible constructions of a contract to favor." Stephenson, 2004 WL 383317, at *6. However, the rule "does not trump other rules of construction…[and] does not negate the actual intention of the parties, where that can be deduced from other evidence." Id.

C. The Contract Between Hosea and Thomas & Betts

The Contract contains three references to insurance. Paragraph Two contains the first and provides that the "purchase price of $727,191…shall include," among other things, all applicable "transport insurance costs." (Contract, Trial Exh.

5, ¶¶ 2, 2.3.) Paragraph Seventeen, titled "Insurance," requires that Hosea maintain four specific types of insurance throughout the term of the Contract and further provides that Thomas & Betts "reserves the right to require Seller to obtain additional types of insurance coverage and/or higher coverage limits where Purchaser in its sole discretion deems same to be appropriate." (Id. ¶ 17.) The final reference, incorporated into the Contract by Paragraph Twenty-Three, is a Project Proposal (Exhibit A) which, in accounting for a purchase price of $841,191.00, contains a line item termed "Insurance" for which there is a corresponding charge of $17,631.00. (Id. Exh. A.)

Based on this language, any requirement that Hosea obtain transport insurance is not immediately apparent. Paragraph Two clearly states that all applicable "transport insurance *costs*" are to be included in the purchase price paid by Thomas & Betts. (Id. ¶¶ 2, 2.3) (emphasis added.) It does not explicitly require Hosea to obtain the policy. Although it might otherwise be reasonable to assume Hosea's obligation, it is difficult to do so given Paragraph Seventeen. That paragraph is devoted entirely to the subject of insurance, explicitly states the types of insurance Hosea must maintain and in what amounts, and further provides that Thomas & Betts may later require Hosea to obtain different types and/or greater levels of insurance. (Id.

¶ 17.) Transport insurance is not included. The Project Proposal attached and incorporated into the Contract does not resolve the issue. It states that $17,631.00 of the purchase price is attributable to "Insurance," but does not describe any particular type of insurance. (Id. at Exh. A.)

Reviewing the Contract from "beginning to end and all its terms," the meaning of Paragraph Two is unclear. Cocke, 690 S.W.2d at 237. The language clearly requires Hosea to bear the cost of transport insurance, but the paragraph is silent about which party must obtain the insurance. This duty to obtain the transport insurance "may fairly be understood in more ways than one" and is therefore ambiguous. Allstate, 195 S.W.3d at 611. Although Paragraph Two would support an inference that the purchase price includes Hosea's acquisition of transport insurance, in light of Paragraph Seventeen, one might just as easily read Paragraph Two to require Hosea to *pay* the cost of such insurance without independently obtaining the policy. Because each interpretation is supportable, each is reasonable, and this aspect of the Contract is "ambiguous." See id. at 611-12.

When confronted with an ambiguous contract, the court considers extrinsic parol evidence to determine the parties' intent. Id. That evidence includes the "contracting parties' conduct and statements regarding the disputed provision, to

guide the court in construing and enforcing the contract." Id. at 612.

Hosea contends that its initial proposal included Motor Truck Cargo insurance, a form of transport insurance, but that insurance was not included in the Contract Thomas & Betts drafted. (Def.'s Stmt. of Undisputed Facts ¶ 14.) Thomas & Betts disputes this interpretation. Although "Motor Truck Cargo insurance" was not "attached to the Agreement or specifically mentioned in the Agreement," it argues that "Hosea's turnkey price included the cost of transport insurance which Thomas & Betts contends Hosea was required to provide and pay for." (Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts ¶ 14.)

The project proposal was entered into evidence at the original trial as Trial Exhibit 75. Section 5 of the proposal is titled "Insurance Information." (Tr. Exh. 75, at T&B 1269.) In that section, under the heading "Hosea Project Movers Insurance Coverages," the following types of insurance are listed: general liability, auto and truck liability, motor truck cargo, and worker's compensation. (Id. at T&B 1270.) This language seems to support Thomas & Betts' position that Hosea's proposal "represented that [it] had Motor Truck Cargo insurance coverage in place that was applicable to and provided coverage for all [its] transportation-related activities." (Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts ¶ 13.) However, comparing

the proposal to the final Contract casts doubt on the validity of this argument.

Thomas & Betts essentially argues that, because of the proposal's representation that Hosea already had motor truck cargo insurance in place, explicitly requiring it in the Contract was unnecessary. If this be true, the court is left to wonder why the insurance section of the Contract explicitly requires worker's compensation, general liability, and automobile liability insurance, although they appear with motor truck cargo insurance in the project proposal among Hosea's "insurance coverages." (Contract, Tr. Exh. 5, ¶ 17; Tr. Exh. 75, at 1270.) This discrepancy defeats Thomas & Betts' argument. Similarly, however, the presence of "transport insurance costs" in Paragraph Two of the Contract is inconsistent with Hosea's contention that Thomas & Betts did not want this form of insurance. The project proposal does not resolve the Contract's ambiguity.

Beyond the project proposal, the parties do not refer the court to any parol evidence which purportedly supports a particular interpretation of "transport insurance costs."[2]

[2] Thomas & Betts also refers the court to certain portions of the trial testimony of Ernie Ligget and David Hosea. That testimony, however, mostly concerns the fact that the Contract terms were negotiated (as opposed to having been submitted by Thomas & Betts). The testimony does not otherwise support a particular interpretation of the provision at issue.

Consideration of parol evidence thus fails to resolve the ambiguity.

The court is left to apply the well-established rule that ambiguity in a contract is construed against the drafting party. Hanover, 425 S.W.2d at 592. Although other states have found that this rule is most appropriate where contracts are offered on a take it or leave it basis and/or where one of the contracting parties is more sophisticated than the other, Tennessee courts do not qualify the application of the rule in those terms. See id.

Thomas & Betts argues that the rule is inapposite here because the terms of the Contract were extensively negotiated by both parties. (Pl.'s Opp. at 15-18.) That the terms of a contract were negotiated does not, however, preclude application of the rule. See Borchert Enterprises, Inc. v. Webb, 584 S.W.2d 208, 210 (Tenn. Ct. App. 1979) (holding that rule applied where lessor and lessee "negotiated the terms of the lease," but the instrument was ultimately drafted by one party).

In this case, although representatives from both sides negotiated the terms, the final Contract was drafted by Thomas & Betts and sent by its employee Matt Orr to David Hosea for his signature. (Exh. E to Opp. to Mot. for Summ. J. at 9-10; Exh. F to Opp. to Mot. for Summ. J. at 17-18.) Any ambiguity in the Contract is therefore to be construed against Thomas & Betts.

Hanover, 425 S.W.2d at 592. Thus, in resolving the current dispute, use of the term "transport insurance costs" merely required Hosea to bear the costs of that insurance, not to obtain the policy independently. Hosea's request for summary judgment on this issue is GRANTED.

V. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED.

So ordered this 2nd day of November, 2007.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE