

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**DeMARIA/WHARTON-SMITH
JOINT VENTURE,
Plaintiff/Counter-Defendant,**

v.

**Case No. 19-172547-CB
Hon. James M. Alexander**

**ARISCO CONTRACTING GROUP, INC.,
Defendant/Counter-Plaintiff,**

and

**DeMARIA/WHARTON-SMITH
JOINT VENTURE
Plaintiff,**

v.

**AMALIO CORPORATION,
Defendant.**

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITIONS

This matter is before the Court on cross motions for partial summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(F)(2).

As it relates to the current motion, Plaintiff's Second Amended Complaint both Arisco and Amalio are required to indemnify Plaintiff against any liability arising out of or in connection with their subcontractor agreements. Based on the same, Plaintiff argue that

Defendants were required to defend and indemnify Plaintiff against the Detroit Zoo's arbitration demand and subsequent settlement agreement. Both parties have failed to do the same.

On these general claims, Plaintiff filed its Second Amended Complaint claiming among other things, (Count II) breach of contract (indemnity and defense) – Arisco; and (Count VI) breach of contract (indemnity and defend) - Amalio.

As stated, Plaintiff, Defendant Arisco, and Defendant Amalio now move for partial summary disposition under MCR 2.116(C)(8) and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹ And a (C)(10) motion tests the factual support for a plaintiff's claims. *Id.*²

The indemnity clause in both subcontractor agreements provides:

To the fullest extent permitted by law, the Subcontractor shall secure, defend, protect, hold harmless and indemnify the Owner, Joint Venture and the Architect, Engineer or other Design Professional and any of their respective agents, servants and employees against any liability, loss, claims, demands, suits, costs, lines and expenses whatsoever, arising from bodily injury, sickness, disease (including death resulting therefrom), of any persons, or the damage or destruction of any property, including contamination of or adverse effects to property, or loss of use, arising out of or in connection with the performance of any work relating to this Subcontract including extra work assigned to the Subcontractor, based upon any act or omission, negligent or otherwise, of (a) the Subcontractor or any of its

¹ Such a motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5) (emphasis added). Further, “[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). “When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

² In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

agents, employees or servants, (b) any sub/subcontractor, supplier or materialman of the Subcontractor, or any agents employees or servants thereof, (c) any other person or persons. The obligation of indemnification contained herein shall exclude only those matters in which the claim arise out of the specific and affirmative allegations of the sole negligence of the Owner, the Architect, the Joint Venture or any of their respective agents, servants and employees and then only if and after such specific and affirmative allegations are judicially affirmed. The obligations herein shall apply to claims which sound in either tort or contract. (Plaintiff's Exhibit A, §8).

Plaintiff argues that since the Polk Penguin Conservation Center leaked, and both Defendants were responsible for construction and waterproofing, they should be required to indemnify Plaintiff against the Detroit Zoo's arbitration demand. Arisco argues that Plaintiff breached the contract prior to the indemnification issue arose, and at minimum, argues that there is a question of fact regarding Arisco's negligence under the contract. While Amalio argues that it was an agent of Plaintiff, and therefore, the indemnity clause does not apply.

After a review of the pleadings and the briefing for the motions at issue, the Court finds that it they are replete of factual issues. First and foremost, the above-stated indemnification clause does not give Plaintiff blanket immunity against any suit or arbitration demand from the Detroit Zoo. Rather, the clause states that the Defendant's are required to defend and indemnify against damage "arising out of or in connection with the performance of any work relating to this Subcontract." Therefore, Plaintiff must first establish that Defendants were responsible for the alleged damage to the Polk Penguin Conservation Center. And there are instances where Plaintiff's own exhibits contradict its position that Defendants are responsible for the damage.³

³ In one such instance, Plaintiff's insurance company sent a letter to Defendant Arisco's insurance carrier stating that, "the JV has asserted in the pleadings that neither it nor its subcontractors have furnished any defective labor or materials." (Defendant Arisco's Exhibit 1).

As such, Defendants have created a question of fact as it relates to Plaintiff's indemnification claim. Based on the same, the cross motions for partial summary disposition of Plaintiff's indemnity claims are DENIED.

IT IS SO ORDERED.

January 29, 2020
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge