STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

THE DOUGLAS COMPANY,
Plaintiff,

Case No. 19-112811-CB

V

Hon. F. Kay Behm

EASTSIDE TILE & MARBLE, INC., SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, and PAUL MARTIN d/b/a PAULS'S PORCH AND CHIMNEY,
Defendants.

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OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of said Court held in the Courthouse
In the City of Flint, in said County,
on the 16th day of April, 2020.

PRESENT: HON. F. KAY BEHM, ASSIGNED CIRCUIT COURT JUDGE

Factual and Procedural History

On May 30, 2019, Plaintiff, The Douglas Company ("Douglas") filed a complaint against East Side Tile & Marble, Inc. ("East Side") and Selective Insurance Company of South Carolina ("Selective"). In its complaint, Douglas alleges that East Side breached its contract with Douglas to defend, indemnify, and hold Douglas harmless and asks the Court to grant declaratory relief ordering East Side and its insurer, Selective, to provide insurance coverage and a defense for a claim brought by Chris Mattice ("Mattice") against Douglas. On October 9, 2019, with the Court's permission, Douglas filed its First Amended Complaint wherein Paul Martin d/b/a Paul's Porch and Chimney ("Martin") was added as a defendant. In addition to its claims against East Side and Selective, Douglas also requests declaratory relief to order Martin to defend, indemnify, and hold Douglas harmless for the Mattice lawsuit.

On November 6, 2019, Douglas filed its Motion for Partial Summary Disposition. Douglas asks this Court to find that East Side must defend, indemnify, and hold Douglas harmless as set forth in its First Amended Complaint in: Count I - East Side's Breach of Contract to Defend, Indemnify, and Hold Harmless Douglas; Count II - East Side and Selective' s Breach of Contract to Provide Insurance and a Defense; and Count IV - Declaring Relief that Douglas be Held Harmless, Indemnified, and Defended by East Side and Martin and that Selective Provide Insurance Coverage and a Defense for the Companion Case[1]. Defendant East Side filed its answer to the dispositive motion on November 27, 2019. At oral arguments on December 2, 2019, East

[1] Count III, which is not at issue in this motion, addresses Douglas' claim that it is an intended third-party beneficiary of the subcontract agreement between East Side and Martin.

Side argued that the subject indemnification clause was void or voidable under MCL 691.991. The Court requested supplemental briefing as to the issues raised in this regard. Thereafter, Douglas filed its Supplemental Brief in Support of its Motion for Partial Summary Disposition and East Side filed its Supplemental Answer to Plaintiff's Supplemental Brief.

This matter arises out of an alleged injury that occurred on January 22, 2019, at Genesys Health Park in Grand Blanc, Michigan. Douglas was hired as the general contractor to build a senior residential facility on the Genesys Campus. Douglas hired East Side to perform certain ceramic tile work. East Side subcontracted Martin to do some of the ceramic tile installation. Mattice was an employee of Martin. Mattice sued Douglas in Genesee County Circuit Court, Case No. 19-112316-NO (the "Companion Case"). In the Companion Case, Mattice asserts that he was injured while he was taking scrap tile outside to the construction site's dumpster. Mattice claimed he stepped on an apparent mound of snow covering a pile of scrap 2x4's which moved and caused Mattice to fall. East Side asserts that there is no evidence as to how the scrap wood came to be on the ground, how long it was present, or who was in possession and control of the area when Mattice fell. Douglas contends that even if it is found to be in some part negligent, it cannot be found solely negligent because Mattice admits to tripping over an open and obvious hazard and, as such, the indemnification provision is valid and enforceable against East Side.

Law and Analysis

Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim. *Nicita v Detroit (After Remand)*, 216 Mich App 746, 750; 550 NW2d 269 (1996). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by

accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991). If the defenses are "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery," then summary disposition under this rule is proper. *Id*., quoting *Domako v Rowe*, 184 Mich App 137, 142; 457 NW2d 107 (1990). Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). "Pleadings," as defined in MCR 2.110(A), include only a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. *Vill of Dimondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23, 29 (2000).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. If the motion is properly made and supported, an adverse party must, by affidavit or otherwise, "set forth specific facts showing there is a genuine issue for trial." MCR 2.116(G)(4). If the adverse party fails to do so, and if appropriate, the court must grant the summary disposition motion. *Id*. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in MCR 2.116(G)(6). *Id*. This evidence should be considered in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Where, except for the amount of damages, the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment or partial judgment as a matter of law. *Brown,* 478 Mich at 552. "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Instead, a litigant opposing the

motion must present substantively admissible evidence to the trial court before its decision on the motion, which creates a genuine issue of material fact. *Sprague v Farmers Ins Exch*, 251 Mich App 260, 265; 650 NW2d 374 (2002).

Both parties agree that the relevant terms of the Subcontract Agreement between Douglas (as contractor) and East Side (as subcontractor) are those stated in paragraphs 4 and 5 as follows:

> 4. CONTRACTUAL RELATIONSHIP
>
> In the performance of this Subcontract, the Subcontractor shall operate as an independent contractor. The Subcontractor shall hold the Contractor and the Owner free and harmless from, and hereby indemnifies each of them, against any and all claims, demands, and causes of action, liability, costs, losses and charges, including reasonable attorney fees, arising out of or in connection with any act, omission to act, representation or contract of the Subcontractors, its agents and employees, and its subcontractors.
>
> 5. INJURY AND DAMAGE TO PERSONS AND PROPERTY
>
> (a) To the fullest extent allowed by law, the Subcontractor shall be solely responsible for and shall hold the Contractor and the Owners free and harmless from and hereby indemnify each of them against any and all claims, demands, causes of action, losses, issues, costs, damages, and expenses including reasonable attorney's fees, arising out of or in connection with injuries (including death) to any and all persons (including but not limited to the agents and employees to the Owner, the Contractor and the Subcontractor and its subcontractors) and damages to property, and in any way sustained or alleged to have been sustained, in connection with or arising out of the performance of the Subcontractor's Work by the Subcontractor, its agents and employees, and its subcontractors. The Subcontractor will defend any and all suits which may be brought against the Contractor on account of any such injuries, death or property damage, provided, however that the Contractor shall have the option to defend any of said suits itself with its own attorney's with the expense being chargeable to the Subcontractor, and the Subcontractor will reimburse the Contractor for any expenditures that said Contractor may make by reason of the same. The Subcontractor further agrees to comply with the Federal Occupational

Health and Safety Act of 1970, as amended and any similar act of any other governmental authority having jurisdiction.

(b) The Subcontractor agrees to save harmless and indemnify Contractor from all loss, injury, claims, actions, proceedings, liability, damages, fines, penalties, costs and expenses, including legal fees and disbursements, caused or occasioned, directly or indirectly by the Subcontractor's failure to comply with any of said laws, ordinances, rules, regulations, standards, orders, notices of requirements or to correct such violations.

An indemnity provision is void under MCL 691.991(1) if it seeks to indemnify against damages arising out of the sole negligence of an indemnitee, his agents or employees. Specifically, MCL 691.991(1) provides, in relevant part, as follows:

> In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee and indemnitee, his agents or employees, is against public policy and is void and unenforceable. (Emphasis added).

Thus, while an indemnification provision can provide for the indemnification for an indemnitee's own acts of negligence, such a provision cannot provide for indemnification for an indemnitee's sole negligence.

The contractual language at issue in this matter limits the indemnification provision "to the fullest extent allowed by law. . . ." This phrase ensures that the subject indemnification provision does not run afoul of MCL 691.991. Moreover, prior courts have upheld similarly broad indemnification provisions despite alleged violations of MCL 691.991. See *Paquin v Harnischfeder Corp.,* 113 Mich App 43, 47-48; 317 NW2d 279 (1982) and *Sherman v Demaria Building Co., Inc.*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994). The indemnification

provision is not void, in and of itself, even if Douglas is ultimately found to be solely negligent and thereby not entitled to indemnification.

Douglas moves for summary disposition under MRC 2.116(C)(9). Specifically, Douglas asserts that East Side failed to sufficiently defend its case by neglecting to assert that Douglas was solely negligent for Mattice's alleged injuries which would provide a legal basis for East Side to avoid its obligation to indemnify and defend. Notwithstanding the foregoing, in its Answer to Plaintiff's First Amended Complaint, East Side categorically denies that Plaintiff is entitled to any of the relief requested in its First Amended Complaint. Further, East Side, in its Affirmative Defenses to Plaintiff's First Amended Complaint, defends itself by stating in paragraph 3 that "Plaintiff failed to state a cause of action upon which relief can be granted." Further, in paragraph 8 therein, East Side states the "Subcontractor Contract indemnity provision at issue in the Plaintiff's Complaint is unenforceable under Michigan law including but not limited to MCL §691.991, and does not provide for any of the relief alleged by the Plaintiff." MCL 691.991 prohibits the court from enforcing an indemnification provision that protects an indemnitee, such as Douglas, from its sole negligence. East Side has sufficiently pleaded valid defenses to Douglas' claims. Douglas' motion for partial summary disposition under MCR 2.116(C)(9) is denied.

Douglas moves for summary disposition under MCR 2.116(C)(10). Douglas asserts that the clear and unambiguous language of the parties' contract requires the Court, as a matter of law, to grant its motion. East Side notes the complaint filed by Mattice in the Companion Case alleges negligence only on the part of Douglas. East Side further asserts that unless Plaintiff can

prove Mattice's injuries were caused by the negligence of someone other than Plaintiff, Plaintiff is not entitled to the relief sought in its motion for partial summary disposition.

The parties primarily focus on two phrases of the relevant contract language. First, the parties look to language wherein East Side agrees to indemnify and defend against ". . . any and all claims, demands, and causes of action, liability, costs, losses, and charges, including reasonable attorney fees . . . ." Douglas cites case law interpreting such language to be so broad and all-inclusive that the duty to indemnify extends even to the negligence of Douglas as the indemnitee "so long as the damages are not caused solely by Douglas' negligence." See Plaintiff's Motion for Partial Summary Disposition as to East Side at page 11 citing *Paquin v Harnischfeger Corp*, 113 Mich App at 50 and *Fischbach-Natkin Co v Power Process Piping, Inc.*, 157 Mich App 448, 450-51; 403 NW2d 569 (1987). East Side argues that even if Douglas is correct in the foregoing statement of law, Douglas still has to establish the absence of any genuine issue of material fact as to whether anyone other than Douglas was negligent. East Side notes that Douglas has not provided any evidence as to who caused the damages sustained by Mattice; how the scrap wood came to be on the ground; how long the scrap wood was present; and who was in the possession and control of the area in which Mattice fell at the time of the fall.

The second phrase upon which the parties focus specifies that Mattice's alleged damages must have "arisen out of or in connection with any act, omission to act, representation or contact of [East Side], its agents and employees, and its subcontractors." Plaintiff again cites precedent supporting the expansive application of such contract language to require the indemnitor to indemnify an indemnitee. See Plaintiff's Motion for Partial Summary Disposition as to East Side

pages 13-14 citing *Daimler Chrysler Corp*, 260 Mich App 183, 186-187; 678 NW2d 647 (2003). East Side asserts that Douglas must prove that East Side or its agent was in some way negligent.

Douglas has not shown that the alleged damages were caused by someone other than Douglas. From the deposition testimony provided, Mattice was at the jobsite while working for East Side and Mattice was taking trash to the dumpster outside. Taking out scrap was part of the subcontractor's obligations under the parties' agreement. Nonetheless, questions of fact remain as to whether Douglas was solely negligent or whether some other person or entity was negligent. The indemnification provision is invoked only if someone other than Douglas was negligent. At this time, genuine issues of material fact remain as to who, if anyone, was negligent in causing injury to Mattice.

Finally, Douglas argues that even if the Court were to find that a factual dispute remains as to East Side's obligation to indemnify Douglas, East Side still has a separate and distinct duty to defend Douglas citing *Mich Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 116-117; 617 NW2d 725 (2000); *Bush v Holmes*, 256 Mich App 4, 9; 662 NW2d 64 (2003); and *Citizens Ins Co. v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008). However, each of these cases involve an insurer's duty to defend an insured. The general rules for contractual indemnity in commercial transactions, rather than the specific rules governing an insurer's duty to defend, govern an insurer's duty to defend. See *13 Mich Civil Jurisprudence, Indemnity and Contribution,* §15, p 243*; Grand Trunk W RR, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756, 762-63 (2004). Unlike in the insurance context, however, a defendant's duty to defend is not separate and distinct from the duty to indemnify, and is not broader than the duty to

indemnify. Instead, the duty to defend is not absolute, and defendant's contractual duty to defend is not, in and of itself, dispositive in this case. *Grand Trunk W RR, Inc* at 345.

East Side's duty to defend is linked with its duty to indemnify such that East Side only has a duty to defend "only such claims" that fall within its duty to indemnify. Thus, genuine issues of material fact remain as to East Side's obligation to defend as well as its duty to indemnify.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(9) and (10) as to East Side in Counts I, II, and IV of Plaintiff's First Amended Complaint is denied.

Dated: April 16, 2020

/s/ Hon. F. Kay Behm

HONORABLE F. KAY BEHM
ASSIGNED CIRCUIT COURT JUDGE