IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Urbano De La Cruz, Plaintiff, v. J.T. Magen & Co., Inc., Omega Yeast Labs, LLC, and Chicago Cut Concrete Cutting Inc., Defendants.	)	No. 21 L 4259
Omega Yeast Labs, LLC, Third-Party Plaintiff, v. Ewing Doherty Mechanical, Inc., Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

Unless explicitly waived, an employer's liability in a third-party contribution action is limited to the amount the employer paid in benefits under the Workers' Compensation Act. In this case, the operative agreement waives the limitation, but the party seeking to gain the advantage of that waiver is neither a direct nor an indirect third-party beneficiary to the agreement. For that reason, the third-party plaintiff's motion to dismiss the third-party defendant's affirmative defense of limited liability must be denied.

Facts

On July 19, 2019, Omega Yeast Labs, LLC, executed an agreement with general contractor J.T. Magen & Co., Inc., for services in connection with the construction of a building located on land Omega owned at 4720 West Pensacola Place in Chicago. The Omega-Magen agreement contained a provision, entitled "Indemnification," stating, in part, that:

> To the fullest extent permitted by law, [Magen] agrees to fully indemnify, defend and hold harmless [Omega] . . . from and against

> any and all claims, loss, suits, damages, liabilities [and] professional fees . . . arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . caused in whole or in part by negligent acts or omissions of [Magen], a Subcontractor . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph.

On December 6, 2019, Magen entered into a purchase order with Ewing-Doherty Mechanical, Inc., for sewer and water service work at the construction site. The purchase order contained two paragraphs under the title "Indemnification" that are relevant here. First, paragraph 16 provides, in part, that:

> 16. To the fullest extent permitted by law, [Ewing-Doherty] agrees to fully indemnify, defend and hold harmless [Magen], [Omega], their officers, directors, agents and employees . . . from and against any and all claims, loss, suits, damages, [and] liabilities . . . brought or assumed against any of the Indemnitees by any person, entity or firm, arising out of or in connection with or as a result of or as a consequence of (a) the performance of the Work . . . or (b) any breach of this Agreement. . . . The indemnification obligations under this agreement shall not be restricted in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for [Ewing-Doherty] under workers' compensation acts (including, but not limited to, the Illinois Workers' Compensation Act) . . . and shall extend to and include any actions brought by or in the name of any employee of the Subcontractor. . . . This indemnification shall continue beyond the date of completion of the work.

Second, paragraph 17 provides, in part, that:

> 17. Subcontractor hereby alleges that its obligation to defend, indemnify and hold harmless [Magen], [Omega], their officers, directors, agents and employees . . . shall not in any way be affected or diminished by any statutory or constitutional immunity it enjoys from suits by its own employees or from limitations of liability or recovery under workers' compensation laws.

There also exists a "Contract Transfer to Owner" provision in the Ewing-Doherty agreement. As provided, in part:

> [Ewing-Doherty] shall complete the performance of its obligations hereunder for the benefit of [Omega] directly, in accordance with the terms and conditions of this Agreement, in the event Owner elects to assume this Agreement and upon the written consent from [Magen], and in that event, [Magen] shall have no further liability for any Work performed or claims that may arise after the date of Owner's assumption.

Ewing-Doherty employed Urbano De La Cruz at the Omega work site. On April 27, 2020, De La Cruz was working to connect sewer lines near an excavation at the site. De La Cruz fell allegedly because of the excavation's unsafe condition and was injured. Sometime after his fall and injury, De La Cruz filed a claim for benefits against Ewing-Doherty pursuant to the Workers' Compensation Act. 820 ILCS 305/1 – 30.

On March 30, 2022, De La Cruz filed a first amended complaint against the defendants. On May 12, 2022, Omega filed a third-party complaint for contribution against Ewing-Doherty pursuant to the Joint Tortfeasor Contribution Act. 740 ILCS 100/0.01 – 5. Omega alleges that Ewing-Doherty owed De La Cruz a duty to provide a safe working environment and breached its duty by failing, among other things, to stop work despite knowing of the unsafe condition, to train and supervise De La Cruz, to inspect the trench area, and to warn employees of the unsafe condition. Omega alleges that if De La Cruz obtains a judgment against Omega, Omega is entitled to contribution from Ewing-Doherty for all sums in excess of Omega's *pro rata* share of common liability.

On August 3, 2022, Ewing-Doherty filed its answer to Omega's third-party complaint for contribution. Ewing-Doherty also raised an affirmative defense based on the opinion in *Kotecki v. Cyclops Welding Corp.* 146 Ill.2d 155 (1991).[1] Ewing-Doherty alleges that as an employer-third-party defendant to a contribution claim, Ewing-Doherty is liable in contribution only for the amount equal to its statutory liability under the Workers' Compensation Act. If, therefore, De La Cruz were to obtain a judgment, Ewing-Doherty's liability would be limited to the amount it paid to De La Cruz in workers' compensation benefits.

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[1] Under *Kotecki* and its progeny, an employer's maximum contribution toward liability is limited to the amount paid and to be paid in workers' compensation benefits under the statute. 146 Ill. 2d at 165.

On August 5, 2022, Omega filed its motion to dismiss Ewing-Doherty's *Kotecki* affirmative defense. The parties fully briefed the motion and supplied the necessary contracts as exhibits.

Analysis

Omega brings its motion to dismiss pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619(a)(9) ("the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim"). A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

Omega argues that the Magen-Ewing-Doherty purchase order is the affirmative matter that defeats Ewing-Doherty's *Kotecki* affirmative defense of limited liability. According to Omega, Ewing-Doherty's duty to indemnify Omega pursuant to paragraph 17 of the purchase order is not "in any way . . . affected or diminished by any statutory or constitutional immunity it enjoys from suits by its own employees or from limitations of liability or recovery under workers' compensation laws." Omega's argument presumes, therefore, that Omega is a third-party beneficiary to the Ewing-Doherty agreement.

Third-party beneficiaries are of two types, direct or incidental. Direct third-party beneficiary status exists based on a contract's express provision "identifying the third-party beneficiary by name or by description of a class to which the third party belongs." *Turner v. Orthopedic & Shoulder Ctr., S.C.*, 2017 IL App (4th) 160552, ¶ 48 (quoting *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (3d Dist. 2009)); *F.H. Paschen/S.N. Nielson, Inc. v. Burnham Station, L.L.C.*, 372 Ill. App. 3d 89, 96 (1st Dist. 2007). Importantly, only a direct beneficiary has a right against the contracting parties. *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.*, 78 Ill. 2d 381, 384-85 (1980) (quoting *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 257 (1931)).

In contrast, an incidental third-party beneficiary is one "who receives an unintended benefit from a contract." *Bank of Am. Nat'l Ass'n*

v. Bassman FBT, L.L.C., 2012 IL App (2d) 110729, ¶ 27 (citing *Caswell v. Zoya Int'l, Inc.*, 274 Ill. App. 3d 1072, 1074-75 (1st Dist. 1995)). There exists in Illinois "a strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party." *Estate of Willis v. Kiferbaum Constr. Corp.*, 357 Ill. App. 3d 1002, 1007 (1st Dist. 2005). To overcome that presumption, "the implication that the contract applies to third parties must be so strong as to be practically an express declaration." *F.H. Paschen/S.N. Nielsen,* 372 Ill. App. 3d at 96. "That the parties expect, know, or even intend that the contract benefit others is insufficient to overcome the presumption that the contract was intended only for the parties' *direct* benefit." *Bank of Am.*, 2012 IL App (2d) 110729, ¶ 27 (emphasis in original); *see also Wilfong v. L.J. Dodd Constr.*, 401 Ill. App. 3d 1044, 1057 (2d Dist. 2010).

The Magen-Ewing-Doherty purchase order plainly provides that Omega could be either a direct or an indirect beneficiary to that agreement. Yet paragraph 20 requires Ewing-Doherty to complete its performance obligations under the agreement for Omega's benefit, only under certain circumstances. The paragraph makes clear that the contract could be transferred to Omega if: (1) Omega elected to assume the Magen-Ewing-Doherty agreement; and (2) Magen provided written consent. Give those pre-conditions, it does not matter if Omega is a direct or an indirect third-party beneficiary to the Magen-Ewing-Doherty agreement. Omega cannot claim any advantage under the agreement because neither it nor Magen met either of the predicate requirements for the contract to be transferred to Omega. This conclusion is critical here because paragraphs 16 and 17 otherwise appear to provide a valid and explicit waiver of Ewing-Doherty's *Kotecki* limitation on liability. That liability is, therefore, not waived in Omega's favor under the Magen-Ewing-Doherty agreement.

Omega's argument also fails under its own agreement with Magen. That agreement's indemnification provision does not even mention *Kotecki* or any party's limitations to liability under the Workers' Compensation Act. Indeed, the opposite conclusion is true. The provision states that any obligations under the agreement "shall not be construed to negate, abridge, or reduce other rights or obligations of indemnify which would otherwise exist. . . ." In other words, the Omega-Magen agreement acknowledges liability limitations, including those under *Kotecki.*

Conclusion

For the reasons presented above, it is ordered that:

The motion to dismiss brought by the third-party plaintiff, Omega, to dismiss the affirmative defense of the third-party defendant, Ewing-Doherty, is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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