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

Ameer Khan, Plaintiff, v. Walsh Construction Company, an Illinois corporation, Walsh Construction II, LLC, an Illinois limited liability corporation; Transystems Corporation, a foreign corporation, and Electric Conduit Construction Co., a foreign corporation, Defendants.	)	No. 20 L 11749
Transystems Corporation, Third-Party Plaintiff, v. Gulaid Consulting Engineers, P.C., Third-Party Defendant.	)	
Walsh Construction II, LLC, Third-Party Plaintiff, v. Gulaid Consulting Engineers, P.C., Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

An employer may contractually agree to waive its cap on liability that is otherwise guaranteed by the Workers' Compensation Act. Here, the agreement between a general contractor and a subcontractor-employer waived the latter's cap on liability. As a result, the general contractor's motion to strike the subcontractor-employer's affirmative defense that its potential liability in a third-party contribution action is limited to the extent of its worker's compensation payment must be granted.

Facts

On November 29, 2018, the Illinois State Toll Highway Authority retained Transystems Corporation to provide engineering consulting services in connection with a bridge reconstruction project on Interstate 294 in Western Springs. On February 1, 2019, Transystems executed a subcontract with Gulaid Consulting Engineers, P.C. for additional engineering consulting services. The subcontract contains a paragraph—6.10—entitled, "Indemnity," that provides:

> CONSULTANT [Gulaid] shall defend, indemnify and hold harmless TRANSYSTEMS and OWNER from and against all losses, claims, damages, or expenses to the extent such losses, damages or expenses are caused or alleged to be caused by any negligent act, error, or omission of CONSULTANT or any person or organization for whom CONSULTANT is legally liable, including but not limited to, subconsultants, employees, agents or representatives.

On November 2, 2019, Ameer Khan slipped, fell, and suffered injuries while working on the bridge construction project. Gulaid employed Khan at the time of his injury. After his injury, Khan applied for and received benefits pursuant to the Workers' Compensation Act.

On January 2, 2021, Khan filed his first amended complaint against the defendants. The first-amended complaint raises negligence, construction negligence, and premises liability causes of action against each defendant. On March 2, 2021, Transystems filed a third-party complaint for contribution against Gulaid. Walsh Construction II, LLC filed a similar third-party complaint. Transystems' third-party complaint seeks unlimited contribution from Gulaid based on the subcontract's indemnity provision.

Gulaid answered the third-party complaints and later obtained leave to file affirmative defenses to both third-party complaints. Gulaid's first affirmative defense states that: "Pursuant to the Illinois Supreme Court decision in the Kotecki case, GULAID CONSULTING ENGINEERS, P.C. is not liable in this action for any amount over the amount recovered by the Plaintiff under the Illinois Worker's [sic] Compensation Act."

On January 13, 2022, Transystems filed a motion to strike and dismiss Gulaid's first affirmative defense. The parties fully briefed the motion.

Analysis

Code of Civil Procedure section 2-619 authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. 735 ILCS 5/2-619; *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). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995).

One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by "affirmative matter" that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. While the statute requires affirmative matter be supported by an affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *See id.*

Under Illinois law, for there to be a contractual waiver of the *Kotecki* cap, the contract at issue must have a specific valid provision by which the employer demonstrates its intent to waive the cap on damages provided by *Kotecki*. *See Liccardi v Stolt Terminals, Inc.*, 178 Ill. 2d 540, 545 (1997); *Estate of Willis v. Kiferbaum Constr. Corp.*, 357 Ill. App. 3d 1002, 1006 (1st Dist. 2005). It is also well settled that the damages cap set by *Kotecki*, 146 Ill. 2d 155 (1991), is not absolute and can be waived if an employer enters into an indemnification agreement prior to the commencement of litigation in which the employer agrees to assume full liability for damages. *See Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 208 (1977); *see also Virginia Surety Co. v. Northern Ins. Co.*, 224 Ill. 2d 550, 559 (2007) ("Nothing in *Kotecki* prohibits an employer from volunteering to remain liable for its *pro rata* share of damages proximately caused by its negligence; *Kotecki* simply allows the employer to avail itself of the *Kotecki* cap on its liability.").

The disputed provision is governed by the Illinois Construction Contract Indemnification for Negligence Act (Anti-Indemnification Act) (740 ILCS 35/0.01 et seq.), which voids any agreement in a construction contract to indemnify or hold harmless a person from that person's negligence. 224 Ill. 2d at 559. There is, however, an important distinction between "contribution" and "indemnification." Contribution distributes the loss among the tortfeasors by requiring each to pay its proportionate share, while

indemnification shifts the entire loss from one tortfeasor who has been compelled to pay it to another. *Virginia Surety Co. v. Northern Ins. Co.*, 362 Ill. App. 3d at 574 (quoting W. Prosser, Torts, § 51, at 310 (4th ed. 1971)). Courts have interpreted these so-called "indemnity provisions" requiring a subcontractor to "indemnify and hold harmless" a general contractor for the general contractor's liability for injuries incurred from the subcontractor's work to be seeking contribution. 224 Ill. 2d at 559. Thus, if an employer agrees to assume unlimited liability, the employer waives the *Kotecki* limitation for contribution claims. *Braye,* 175 Ill. 2d at 208.

The parties' arguments for and against dismissing Gulaid's affirmative defense require this court to interpret the Transystems-Gulaid agreement, particularly paragraph 6.10. The well-settled rules of contract interpretation begin with the principle that parties may contract away nearly any and all of their rights, even those that are constitutionally or statutorily protected. *In re Nitz*, 317 Ill. App. 3d 119, 124 (2d Dist. 2000) ("Parties to a contract are free to include any terms they choose, as long as those terms are not against public policy and do not contravene some positive rule of law."). If a court construes a contract, "the primary goal is to ascertain and give effect to the intention of the parties at the time the contract was formed." *Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶ 77 (citing cases).

A court is to look first to the language of the contract to determine the parties' intent. *See Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011) (citing *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007)). A contract is to be construed as a whole, reading each provision in light of the others. *See id.* Courts are cautioned that the parties' intent cannot be ascertained by viewing a clause or provision in isolation. *See id.* If the words in a contract are clear and unambiguous, they must be given their "plain, ordinary, and popular meaning." *See Central Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141 153 (2004). If, however, a contract's language is susceptible to more than one meaning, it is considered ambiguous. *See Gallagher*, 226 Ill. 2d at 233. Only if contract language is ambiguous may a court consider extrinsic evidence to determine the parties' intent. *Id.*

Transystems alleges that Gulaid negligently caused Khan's injury in a variety of ways. Based on those claims, Transystems argues that an agreement between an employer, such as Gulaid, to indemnify an upper-tier contractor, such as Transystems, is to be construed as a waiver of the employer's *Kotecki* cap. According to Transystems, its third-party complaint against Gulaid seeks only contribution from Gulaid, not indemnification. Transystems concludes that the indemnity provision in the Transystems-Gulaid contract acts as a waiver of Gulaid's *Kotecki* cap; therefore, Gulaid's first affirmative defense should be stricken and dismissed with prejudice.

In response, Gulaid makes two arguments. First, Gulaid argues that Transystems is seeking indemnification rather than contribution in violation of Illinois public policy. Gulaid argues that Transystems is seeking unlimited indemnification from Gulaid in violation of the Construction Contract Indemnification for Negligence Act. 740 ILCS 35/0.01 – 3.

The plain language of the indemnification agreement disproves Gulaid's argument. Under that provision Gulaid was contractually obligated to defend and hold Transystems harmless "from and against all losses, claims, damages, or expenses to the extent such losses, damages or expenses are caused or alleged to be caused by any negligent act, error, or omission of [GULAID]. . . ." Consequently, the agreement does not require Gulaid to indemnify any other entity, including Transystems. Since the provision does not violate the statute, the contribution called for in the agreement is valid and binding.

Gulaid's second argument is that the contract does not evidence an explicit waiver of the *Kotecki* cap as is required by the law. Specifically, Gulaid contends the contract needs language specifically invoking the waiver of the workers' compensation cap. Gulaid's fundamental error is the result of relying on *Estate of Willis v. Kiferbaum Constr. Corp.*, 357 Ill. App. 3d 1002 (1st Dist. 2005). In *Willis*, the court interpreted three related contract provisions. Two contained the statement that, "the indemnification obligation . . . shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under . . . workmen's compensation acts." *Id.* at 1007. The court found, unsurprisingly, that this language waived the employer's *Kotecki* limit. *Id.* The third provision did not contain the "shall not be limited" language, consequently, that paragraph did not waive the *Kotecki* limit. *Id.*

Willis is unquestionably correct to the extent that it encourages the use of plain and unambiguous language consistently in a contract. Yet *Willis* is an outlier when compared to earlier Supreme Court decisions that found waivers of *Kotecki* limits in far more generalized language. In *Braye v. Archer-Daniels-Midland Co.*, for example, the court interpreted a purchase-order agreement as providing for contribution so that it would not run afoul of the Anti-Indemnification Act, with the result that the agreement's terms waived the employer's *Kotecki* limit. *See* 175 Ill. 2d at 213-17. In a case decided only seven months later, the court in *Liccardi v. Stolt Terminals, Inc.*, interpreted a vendor agreement similarly and, thereby, validated a waiver of the employer's *Kotecki* limit. *See* 178 Ill. 2d at 548-49.
Since the Supreme Court has not adopted the more stringent test for validating *Kotecki* waivers as called for in *Willis*, this court is constrained to

find that explicit language is unnecessary to waive a *Kotecki* limit. Other courts have affirmed this position given the inconsistencies with the case law. *See Avalos v. Pulte Home Corp.*, No. 04 C 7092, 2006 U.S. Dist. LEXIS 93366, at *33 (N.D. Ill. Dec. 22, 2006) (There are "no 'persuasive indications' that the Illinois Supreme Court, if confronted with this issue again, would follow *Willis* over *Braye* and *Liccardi,* to the extent *Willis* differs. With this in mind, the Court is loathe to adopt and apply additional requirements for a *Kotecki* waiver that the Illinois Supreme Court has not yet adopted, additional requirements that as yet stand in contravention of established Illinois law."). Moreover, presuming *Braye* and *Liccardi* are still controlling, this court is not faced, as was the *Willis* court, with interpreting conflicting contract language in multiple provisions. Rather, paragraph 6.10 provides that:

> [GULAID] shall defend, indemnify and hold harmless TRANSYSTEMS and OWNER from and against all losses, claims, damages, or expenses to the extent such losses, damages or expenses are caused or alleged to be caused by any negligent act, error, or omission of [GULAID] or any . . . subconsultants, employees, agents or representatives.

Thus, from the plain language of the agreement it is clear that Gulaid and Transystems executed a valid *Kotecki* waiver.

Conclusion

For the reasons presented above, it is ordered that:

The defendant-third-party-plaintiff's (Transystems') motion to strike and dismiss the third-party-defendant's (Gulaid's) first affirmative defense is granted.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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