

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

Gerald Mahoney,)	
)	
Plaintiff,)	
)	
v.)	No. 18 L 13131
)	
Chicago Transit Authority, a municipal corporation;)	
Harrington Site Services Company, an Illinois)	
corporation; F.H. Paschen, S.N. Nielsen &)	
Associates LLC, an Illinois LLC, individually and)	
d/b/a Paschen Milhouse Engineering and)	
Construction, Inc., an Illinois corporation)	
individually and d/b/a Paschen Milhouse Joint)	
Venture IV; EXP U.S. Services, Inc., a foreign)	
corporation individually; and Paschen Milhouse)	
Joint Venture IV,)	
)	
<u>Defendants.</u>)	
<hr style="width:60%; margin-left:0;"/>)	
Paschen Milhouse Joint Venture IV,)	
)	
Defendant-Third-Party Plaintiff,)	
)	
v.)	
)	
Evans Electric, LLC,)	
)	
Third-Party Defendant.)	

MEMORANDUM OPINION AND ORDER

Contracts are to be enforced according to their unambiguous language. In this case, two agreements contain proper *Kotecki* limitation waivers, but a sub-subcontract’s provision does not extend an indemnification duty to a higher-tier contractor. For that reason, the third-party plaintiff’s motion to strike the third-party defendant’s affirmative defense must be denied.

Facts

In 2017, the Chicago Transit Authority (“CTA”) executed an agreement (“General Contract” or “Prime Contract”) with Paschen Milhouse Joint Venture IV (“JV”) for improvements to the CTA’s 95th Street Red Line

station in Chicago. On July 26, 2017, JV executed a subcontract with Meade Industries, Inc. for electrical, communication, and other types of work at the 95th Street station. The JV-Meade subcontract contained several provisions relevant to the current dispute:

17. Second Tier Subcontractors

[Meade] shall not sublet the work to be performed under this Agreement either in whole or in part without the prior, express, and written consent of [JV]. All subcontractors under this Agreement shall be subject to the provisions of the General Contract and this Agreement but shall create no contractual relationship with [JV].

* * *

22. General Indemnification

a) To the fullest extent permitted bylaw, [Meade] shall indemnify, defend and protect and hold harmless [JV] . . . from and against any and all liabilities . . . arising out of or resulting from performance of the Work, provided that such liability . . . is attributable to bodily injury . . . but only to the extent caused or alleged to be caused in whole or in any part by the negligent acts or omissions of [Meade], anyone directly or indirectly employed by [Meade] or anyone for whose act [Meade] may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

b) Any and all claims made or brought against the Indemnified Parties by any employees of [Meade], anyone directly or indirectly employed by [Meade] or anyone for whose acts [Meade] may be liable, the Indemnification obligation under Paragraph Twenty-Two hereof shall not be limited in anyway [sic] by a limitation of the amount of type of damages, compensation or benefits payable by or for [Meade] under worker's [sic] compensation laws, disability benefit laws or other employee benefit laws of any state or jurisdiction.

On June 30, 2017, Meade executed a sub-subcontract agreement with Evans Electric, LLC ("Evans") for electrical raceway services at the 95th Street station. The Meade-Evans agreement also contains various provisions relevant to this dispute:

Article 1

Meade Industries, Inc. is a party to a Principal Agreement with Paschen Milhouse Joint Venture IV for CTA 95th Street Terminal Improvements. Paschen Milhouse Joint Venture IV has entered into a Prime Contract with the Chicago Transit

Authority for that project. This Principal Agreement together with all of the terms and conditions contained therein, and the terms and conditions contained in the Prime Contract are incorporated by reference into this Subcontract . . . between [Meade] and [Evans].

Article 2

2.2 Principal Agreement Documents. The Principal Agreement Documents are hereby incorporated by reference as though fully set forth in this Agreement. [Evans], its suppliers and subcontracts will be and are bound by any and all of the Principal Agreement Documents insofar as they relate in any way, directly or indirectly, to [Evans's] Work including but not limited to the Prime Contract.

[Evans] agrees to be bound to [Meade] and [the CTA] under the same terms and conditions and to the same extent as [Meade] is bound to [the CTA] under the Prime Contract. Where reference is made in the Principal Agreement to [Meade] and the work or specification therein pertains to [Evans's] trade, craft or type of work, then such work or specification shall be interpreted to apply to [Evans's] duties and obligations under the Principal Agreement and this Subcontract Agreement.

2.3 Conflicts. In the event of a conflict or inconsistency between the terms of this Agreement with those of the Principal Agreement, the terms of the Principal Agreement shall control. In all other events, the terms of this Subcontract Agreement are to be in addition to those in the Principal Agreement.

* * *

Article 11

11.1 Indemnification. [Evans] hereby assumes the entire liability for its own negligence and fault and the negligence and fault of its own employees and/or subcontractors. To the fullest extent permitted by law, [Evans] agrees to indemnify and hold harmless [the CTA] and [Meade] . . . from and against any and all claims . . . that [the CTA] and [Meade] may sustain as a result of any act or failure to act, negligent or otherwise, of [Evans] . . . in connection with [Evans's] work. The indemnification obligations herein shall not be limited by any limitation on amount of type of damages, compensation or benefits payable by or for [Evans] or [Evans's] subcontractors under worker's [*sic*] or workman's [*sic*] compensation acts . . . and any defenses allowing [Evans] to limit its obligation for contribution are hereby waived. [Evans's] indemnification obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or

obligation of indemnity that would otherwise exist as to any party or person, and shall survive the termination or expiration of the Subcontract.

On December 7, 2017, Gerald Mahoney was working for Evans at the 95th Street construction site. Mahoney tripped on an unsecured and unmarked wooden sheet covering a plumbing drain hole, fell, and was injured. On December 7, 2018, Mahoney filed suit against the defendants.

On a date not evident in the record, JV filed a third-party complaint for contribution against Evans. On April 1, 2020, Evans filed its answer to the third-party complaint. The answer also contained two affirmative defenses. In its first affirmative defense, and the one at issue in this current dispute, Evans alleges that it paid Mahoney workers' compensation benefits and, therefore, Evans's liability is limited to the amount of its workers' compensation lien, a principle established in *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991). On January 18, 2022, JV filed a motion to strike Evans's *Kotecki* affirmative defense. In essence, JV argues that both the JV-Meade and the Mead-Evans agreements contained *Kotecki* waivers, and the latter agreement incorporated the former's indemnification provisions. The parties subsequently briefed the motion.

Analysis

JV brings its motion to strike Evans's *Kotecki* affirmative defense pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619(a)(9). 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).

In this dispute, JV's argument is based on the JV-Meade subcontract and the Meade-Evans sub-subcontract. As a result, this court is being asked to interpret the two contracts. To construe a contract, a court's primary objective is to carry out the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). That objective requires a focus on the contract's language. *Id.* at 233. A contract is to be construed as a whole, viewing each provision in light of the other provisions. *Id.* If the contract's words are clear and unambiguous, they are to be given their plain, ordinary and popular meaning. *Central Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004).

Since JV is claiming a benefit from the Meade-Evans agreement, this dispute also raises issues of JV's beneficial status, if any. Third-party beneficiaries to an agreement are of two types, direct or incidental. Direct third-party beneficiaries exist 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)). Illinois observes "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).

As a threshold matter, the JV-Meade agreement contains a valid *Kotecki* waiver. The agreement provides that any indemnification obligation is not limited under "worker's [*sic*] compensation laws," meaning that the *Kotecki* cap is inapplicable. The Meade-Evans agreement also contains a valid *Kotecki* waiver. Under that agreement, indemnification obligations are not limited under "worker's [*sic*] or workman's [*sic*]¹ compensation acts . . . and any defenses allowing [Evans] to limit its obligation for contribution are hereby waived."

¹ It is not asking too much for contract drafters to use the gender neutral title of the controlling Illinois statute—the Workers' Compensation Act, 820 ILCS 305/1-30—enacted in 1911, or to employ correctly the possessive apostrophe.

The validity of the agreements' *Kotecki* waivers is, however, a conclusion wholly distinct from JV's argument that Evans's *Kotecki* waiver applies to JV through the flow-down provision in the JV-Meade agreement.² Rather, the flow-down provision in the JV-Meade agreement applies strictly to "negligent acts or omissions of [Meade], anyone directly or indirectly employed by [Meade] or anyone for whose act [Meade] may be liable. . . ." Nothing in the agreement suggests that Meade employed Evans; rather, the relationship was that of principal and agent. Further, nothing in the flow-down provision suggests that Meade would be liable for Evans's negligence.

JV's position is also confounded by its implicit assumption that a flow-down provision provides flow-up indemnification. The unambiguous language of the Meade-Evans agreement independently defeats that suggestion. The Meade-Evans agreement expressly provides that:

[Evans] agrees to indemnify and hold harmless [the CTA] and [Meade] . . . from and against any and all claims . . . that [the CTA] and [Meade] may sustain as a result of any act or failure to act, negligent or otherwise, of [Evans] . . . in connection with [Evans's] work.

The provision makes plain that Evans's indemnification duty extended exclusively to the CTA and Meade. JV is not identified as either a direct or indirect third-party beneficiary to Evans's indemnification duty. As such, JV has no right to contest Evans's indemnification duty under the Meade-Evans agreement.

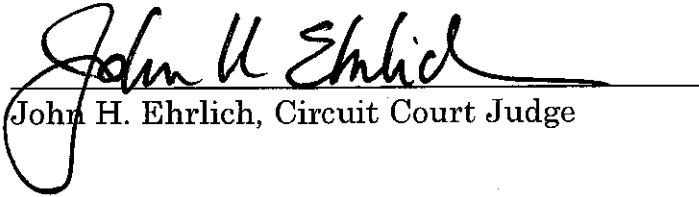
Finally, JV cannot now claim the Meade-Evans agreement means something other than its plain terms. The JV-Meade agreement expressly provides that Meade could not sublet any work without JV's prior, express, and written consent. JV certainly had the opportunity to review the Meade-Evans agreement before approving Evans's as a sub-subcontractor; consequently, JV could have required the agreement be amended to provide that Evans indemnify JV in addition to the CTA and Meade. JV failed to do so, and cannot now disclaim a contract JV expressly approved.

Conclusion

For the reasons presented above, it is ordered that:

² A flow-down provision is one in which a lower-tier contractor assumes obligations a higher-tier contractor owes to another party. *See, e.g., West Bend Mut. Ins. Co. v. Athens Constr. Co.*, 2015 IL App (1st) 140006, ¶ 14 (subcontractor assumed obligations contractor owed to owner).

1. JV's motion to strike Evans's first affirmative defense is denied;
and
2. JV has until September 13, 2022 to answer Evans's first affirmative defense.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075