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

Joshua Rominski,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 507
	)	
W.E. O'Neil (an Illinois corporation), Mather Place (an Illinois corporation), and Mather Lifeways (an Illinois corporation),	)	
	)	
Defendants,	)	
W.E. O'Neil Construction Company,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Service Drywall & Decorating, Inc.,	)	
	)	
Third-Party Defendants,	)	
Mather Place and Mather Lifeways,	)	
	)	
Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
Service Drywall & Decorating, Inc.,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

Whether an employee's training serves as a basis for summary judgment against a third-party complaint for contribution is a question of fact, not law. Here, the sufficiency of

the plaintiff's training by the third-party defendant remains a question for the jury. In contrast, the agreement between the general contractor and subcontractor unquestionably violates Illinois law, and the breach of contract claim is moot. In sum, the third-party defendant's summary judgment motion is granted, in part, and denied, in part.

Facts

On April 10, 2015, Mather Lifeways executed an agreement with W.E. O'Neil (WEO). The agreement called for WEO to act as the general contractor for the renovation of an existing building and construction of a new one, all part of Mather Place, a senior living facility located at 2801 Old Glenview Road in Wilmette. On December 9, 2015, WEO subcontracted with Service Drywall & Decorating, Inc. to perform various projects at the site. The WEO-Service Drywall agreement contained an indemnification provision stating:

> To the fullest extent permitted by law, [Service Drywall] hereby assumes the entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of [Service Drywall] or otherwise, and to all property caused by, resulting from, arising out of, or occurring in connection with [Service Drywall's] (or sub-subcontractor's) execution of the Work. If any claims from such damage or injury (including death resulting therefrom) shall be made or asserted, [Service Drywall] agrees to indemnify and save harmless the General Contractor, W.E. O'Neil Construction Company, O'Neil Industries, Inc., the Owner and Others required in the contract documents, their officers, agents, servants and employees (hereafter referred to in this Article collectively as "Indemnitees") from and against any and all loss, cost, expense liability, damage or injury, including legal fees and disbursements, that the Indemnitees may directly or indirectly sustain, suffer or

> incur as a result thereof. [Service Drywall], upon demand, agrees to and does hereby assume, on behalf of the Indemnitees the defense of any action at law or in equity which may be brought against the Indemnitees upon or by reason of such claims and to pay on behalf of the Indemnitees upon their demand, the amount of any settlement or judgment asserted or threatened against the Indemnitees, the Indemnitees, and each of them, shall have the right to withhold from any payments due or to become due to [Service Drywall] an amount they, the Indemnitees and each of them in their sole, individual discretion, deem sufficient to protect and indemnify the Indemnitees and each of them, from and against any and all such claims loss, cost, expense, liability, damage or injury, including legal fees and disbursements. The General Contractor, in his discretion, may require [Service Drywall] to furnish a surety bond satisfactory to General Contractor guaranteeing such protection which bond shall be furnished by [Service Drywall] within five (5) days after written demand has been made therefore.

In January 2016, Service Drywall hired Joshua Rominski, a union carpenter, and assigned him to work at Mather Place. Rominski had previously completed a four-year union apprenticeship training program as well as OSHA safety training before being hired by Service Drywall. Part of Rominski's training included how to maintain three points of contact while walking up and down scaffolding, stairs, and ladders. Service Drywall also trained Rominski how to walk up and down construction stairways.

On February 9, 2016, Rominski was working at the Mather Place construction site. The only means of accessing upper floors was by a corrugated steel scaffold stairwell tower. While going down the stairwell, Rominski slipped on snow and ice that had accumulated on the stairway. Rominski then fell from the scaffold stairway and was injured.

On January 16, 2018, Rominski filed his complaint against the defendants. On June 26, 2018, WEO filed a third-party complaint against Service Drywall. The third-party complaint presents three counts. Count one is for contribution and alleges that Service Drywall retained and exercised control over the means and methods and safety of the work performed by Rominski and, therefore, owed Rominski a duty of care. WEO claims that Service Drywall breached its duty in a variety of ways, including failing to: inspect the stairway; remove snow or ice from the stairway; enforce its own safety policies; warn; and train Rominski, including the use of three points of contact while on a stairwell. Count two is for indemnification and is based on the provision noted above. According to WEO, the subcontract permits WEO to obtain full indemnification from Service Drywall for any judgment entered against WEO. Count three is for breach of contract. WEO acknowledges that Service Drywall delivered a certificate of insurance showing that Service Drywall's commercial general liability policy names WEO as additional insured. WEO alleges a breach of contract has occurred because it tendered its defense to Service Drywall's insurance carrier, but the carrier failed to provide the insurance required and pay for litigation defense costs and fees. The parties indicated at oral argument that the carrier accepted the tender after Service Drywall filed its summary judgment motion.

Analysis

Service Drywall has brought a motion for summary judgment against WEO's third-party complaint. The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A defendant moving for summary

judgment may disprove a plaintiff's case by introducing affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law; this is the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.*

The parties' presentations at oral argument make disposal of two claims simple. First, the parties acknowledged that Service Drywall's insurance carrier accepted the tender of WEO's defense soon after Service Drywall filed is summary judgment motion. That fact moots WEO's breach of contract cause of action against Service Drywall.

Second, the indemnification clause of the WEO-Service Drywall subcontract unquestionably violates the Illinois Construction Contract Indemnification for Negligence Act (Anti-Indemnification Act). 740 Ill. Comp. 35/0.01 *et seq.* The statue specifically provides that:

> With respect to contract or agreement, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway, bridge, viaducts of other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.

740 ILCS 35/1. The primary object in construing a contract is to fulfill the parties' intentions. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). A court is to look first to the contract's language to determine the parties' intent. *Id.* at 233. A contract must be construed as a whole, viewing each provision in light of the other provisions. *Id.* If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011).

There is no question that the indemnification provision in the WEO-Service Drywall contract violates the Anti-Indemnification Act. Indeed, at oral argument, WEO's counsel did not take much exception to this conclusion. The provision requires Service Drywall to indemnify WEO and its agents "from and against any and all loss, cost, expense liability, damage or injury, including legal fees and disbursements, that the Indemnitees may directly or indirectly sustain, suffer or incur as a result thereof." No irony is lost that the provision's opening phrase states, "[t]o the fullest extent permitted by law," because, in this instance, the fullest extent of the law is "none." The indemnification provision of the contract is unenforceable and, consequently, WEO's claim for indemnification must be dismissed.

The remaining issue concerns WEO's contribution claim against Service Drywall. Service Drywall argues that the evidence in the record establishes that Rominski had been trained by both the union during his apprenticeship and by Service Drywall, training that included how to maintain three points of contact when ascending or descending stairwells. While Rominski may have been expertly trained by both the union and his employer, there remains a question of fact as to whether the training Rominski received was sufficient. As the Illinois Supreme Court wrote long ago, "[w]hat time or training is requisite to make one a competent engineer is no question of law, but one of fact solely." *Joch v. Dankwardt*, 85 Ill. 331, 333 (1877). Noticeable in its absence are any legal citations in Service

Drywall's briefs indicating that the sufficiency of training is a question of law for the court.

Service Drywall's duty argument does not fare any better. Service Drywall argues that it owed no duty to clean and remove snow and ice from the metal scaffolding stairwell tower. According to Service Drywall, WEO was contractually required to make the tower safe and keep it properly maintained. Even if those facts are assumed to be true, missing from Service Drywall's argument is Romiski's concomitant duty for his own safety. In other words, Rominski had a duty to report any known dangerous condition to his foreman, Mike Bruno. Further, Bruno had an independent a duty to supervise Service Drywall's employees and warn them of known dangers. There remain questions of fact as to whether either Rominski or Bruno fulfilled his duties such that they and Service Drywall are free from any comparative negligence. In sum, the contribution claim remains valid.

Conclusion

For the reasons presented above, it is ordered that:

1. Third-party defendant Service Drywall's summary judgment motion as to W.E. O'Neil's third-party complaint is granted, in part, and denied, in part;
2. Summary judgment as to count one—contribution—is denied;
3. Summary judgment as to count two—indemnification —is granted; and
4. Court three—breach of contract—is stricken as moot.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

NOV 04 2021

Circuit Court 2075