

STATE OF MICHIGAN  
COURT OF APPEALS

---

HENRY FORD HEALTH SYSTEM d/b/a HENRY  
FORD HOSPITAL FAIRLANE,

UNPUBLISHED  
April 27, 1999

Plaintiff-Appellee,

v

NAGLE PAVING COMPANY,

No. 205773  
Wayne Circuit Court  
LC No. 97-701300 NO

Defendant-Appellant.

---

Before: Saad, P.J., and Murphy and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court’s order granting summary disposition in favor of plaintiff. We affirm.

Before this Court is an action involving a dispute over contract formation and interpretation. Specifically, defendant argues that plaintiff’s purchase order did not constitute a binding contract; therefore, the indemnity provision outlined in the purchase order could not be enforced against defendant. The trial court granted summary disposition in favor of plaintiff, ordering defendant to indemnify plaintiff for any loss, damage, or expense associated with an underlying lawsuit brought by Paul Ervin after he injured himself while traversing a plywood walkway over pulverized asphalt at defendant’s construction site, which was on plaintiff’s property.

On appeal, this Court reviews the trial court’s decision granting or denying a motion for summary disposition de novo. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 602; 576 NW2d 392 (1997). A motion pursuant to MCR 2.116(C)(10) tests the factual support underlying a plaintiff’s claim. *McGuirk Sand & Gravel, Inc v Meridian Mutual Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). When there is no genuine issue concerning any material fact, except for the amount of damages, the moving party is entitled to judgment as a matter of law. *Id.* The reviewing court “must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party.” *Id.*

Defendant argues that the trial court erred in determining that plaintiff's purchase order constituted the parties' contract. We disagree. To have a valid contract, there must be an offer and acceptance. *Pakideh v Franklin Commercial Mortgage Group, Inc.*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Id.* If an offer is silent with regard to the specific form of acceptance, acceptance may be implied by the offeree's conduct. *Id.* An offer terminates at the expiration of the time given for its acceptance. *Id.* at 640-641.

In this case, Gary Trocino, plaintiff's building supervisor, testified to the process followed by plaintiff when it sought to hire defendant. Trocino solicited a bid for the job from defendant and put the bid in a purchase request, which was sent to plaintiff's purchasing department. After the purchasing department evaluated the purchase request, it issued a purchase order number to defendant. When defendant received the purchase order number, Trocino and defendant coordinated the job. According to Trocino, the only documents that he received from defendant were quotes, which he attached to the purchase request that established defendant's price for the job.

All documents submitted by defendant to plaintiff were clearly marked as a "proposal" for construction. Each of defendant's proposals contained the following provision:

Everything concerning this contract is incorporated herein and that nothing verbal shall be construed as part hereof. This contract will not be binding upon our company until checked by our engineer and countersigned by an officer. This proposal remains firm for 30 days.

None of defendant's proposals were signed by plaintiff, and the proposals only indicated the work that would be done for a given price. These proposals were not contracts, but were firm offers, valid for thirty days, to complete certain construction work at a given price.

After defendant submitted its written proposals or offers, Trocino submitted a requisition to plaintiff's purchasing department. After plaintiff's purchasing department reviewed defendant's offer, they issued a purchase order reflecting defendant's proposed price, but added additional terms, one of which is the indemnity provision that is the subject of this case

Plaintiff's purchase order specifically provided for a method of acceptance by defendant. According to the purchase order, defendant could accept the offer by executing the document or by commencing the work. While defendant did not sign the purchasing/confirming order, defendant began the construction work. Therefore, a contract formed between the parties when defendant commenced work.

Because plaintiff's purchase order constituted the parties' contract, the trial court did not err when it required defendant to defend and indemnify plaintiff for any loss as a result of Paul Ervin's negligence lawsuit. Paragraph 11 of the purchase order provides:

Seller shall defend, indemnify and hold harmless HFHS, its employees, customers, patients, and users of the Articles, from and against any claim, loss, damage, expense arising out of the purchase and/or use of the Articles purchased hereunder and arising out of Seller's (or its subcontractor's) work or performance hereunder . . . .

Indemnity contracts should be construed strictly against the party who drafted them and against the indemnitee. *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448; 452; 403 NW2d 569 (1987). However, indemnity contracts should be interpreted so as to give effect to the intentions of the parties. *Id.* When determining the intentions of the parties, one must consider, in addition to the language used in the contract, the situation of the parties and circumstances surrounding the contract. *Id.*

In this case, defendant's actions contributed to Ervin's injuries. The record shows that defendant's employees assisted in laying the plywood walkway over the pulverized asphalt. Furthermore, defendant's employees testified that they "doctored" up the walkway in an effort to make it safer. Even though plaintiff may have been partially responsible for Ervin's injuries, we believe that the indemnification provision in the parties' contract requires defendant to defend and indemnify plaintiff for its losses as a result of Ervin's lawsuit.

Next, defendant asserts that plaintiff's indemnity provision should be void as a matter of law pursuant to MCL 691.991; MSA 26.1146(1), which provides:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, 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 or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

"[A]n indemnitor is not liable for the indemnitee's negligence, unless the indemnitor is also negligent, regardless of contractual language to the contrary." *Sentry Ins Co v National Steel Corp*, 147 Mich App 214, 219; 382 NW2d 753 (1985).

In this case, we do not believe that the evidence established that plaintiff was *solely* liable for Ervin's injuries. Defendant's employees pulverized the old asphalt during normal business hours without closing down the main entrance. Although defendant contends that plaintiff would not allow the entrance to be closed, there was evidence presented that the plywood used for the walkway was provided by plaintiff and defendant. Even one of defendant's employees admitted that he and his fellow employees "doctored" up the walkway in an attempt to make it safer. Moreover, defendant's employees helped place the plywood planks to create the walkway.

Because there was evidence on the record to establish that defendant's negligence contributed to Ervin's injuries, we believe that MCL 691.991; MSA 26.1146(1) does not apply.

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O'Connell