STATE OF MICHIGAN

COURT OF APPEALS

WAYNE STATE UNIVERSITY and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Plaintiffs-Appellees,

v

SHAMBAUGH FIRE & SAFETY, INC.,

Defendant,

and

TURNER CONSTRUCTION COMPANY,

Defendant/Cross-Plaintiff-Appellant,

and

SHAMBAUGH & SON, L.P.,

Defendant/Cross-Defendant.

UNPUBLISHED
December 2, 2008

No. 278748
Wayne Circuit Court
LC No. 06-620236-CZ

WAYNE STATE UNIVERSITY and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

Plaintiffs-Appellees,

v

SHAMBAUGH FIRE & SAFETY, INC.,

Defendant,

and

No. 278816
Wayne Circuit Court
LC No. 06-620236-CZ

TURNER CONSTRUCTION COMPANY,

Defendant/Cross-Plaintiff,

and

SHAMBAUGH & SON, L.P.,

Defendant/Cross-Defendant-Appellant.

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Defendant Turner Construction Company ("Turner") and defendant Shambaugh and Son, L.P. ("Shambaugh"), each appeal by leave granted the trial court's order denying their motion for summary disposition. We reverse and remand for entry of judgment in favor of defendants.

This case arises from the accidental discharge of a fire sprinkler system, resulting in considerable water damage to plaintiff Wayne State University's fitness center. The construction of the fitness center was completed in September 2000, and the sprinkler accident occurred in January 2006. Defendant Turner was the general contractor on the project and defendant Shambaugh was the subcontractor that installed the sprinkler system. Plaintiff Wayne State and its insurer, plaintiff American International Specialty Lines Insurance company ("AISLIC"), as subrogee, brought this action against defendants, asserting claims of negligence or gross negligence, breach of contract, breach of express or implied warranties, and "breach of implied warranty in tort."[1] The trial court denied defendants' motion for summary disposition.

Defendants argue that plaintiffs' claims were barred by the expiration of the contractual warranties. We agree.

A trial court's grant or denial of summary disposition is reviewed de novo, on the entire record, to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of

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[1] Because plaintiff AISLIC's claims are derivative, the singular term "plaintiff" is used to refer to plaintiff Wayne State University only.

establishing through affidavits, depositions, admissions, or documentary evidence that a genuine issue of disputed material fact exists. *Id.*

"Although incomplete discovery generally precludes summary disposition, summary disposition may nevertheless be appropriate if there is no disputed [factual] issue before the court or if further discovery does not stand a fair chance of finding factual support for the nonmoving party." *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004). "[A] party opposing a motion for summary disposition because discovery was not complete must provide some independent evidence that a factual dispute exists." *Id*. at 477 (internal quotations and citations omitted).

"In interpreting a contract, [a court's] obligation is to determine the intent of the contracting parties." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.* "Once discerned, the intent of the parties will be enforced unless it is contrary to public policy." *Id.*

"[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (internal quotations and citations omitted). "If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products, supra* at 375. Conversely, a contract is ambiguous when its provisions are capable of conflicting interpretations. *Klapp, supra* at 467.

"[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998); see also *Klapp, supra* at 469. On the other hand, the meaning of an ambiguous contract is a question of fact that must be decided by the trier of fact. *Id.*

As a preliminary matter, we note that the general conditions and the general contract between Turner and plaintiff are incorporated into Turner's subcontract with Shambaugh. Although the definition of "subcontractor" in the general conditions states that there is no contractual relationship between plaintiff and Shambaugh, it expressly states that plaintiff "is the intended third-party beneficiary" of Turner's contract with Shambaugh. Thus, there is no merit to Shambaugh's argument that plaintiffs cannot assert a breach of contract claim against it. The terms of the general conditions apply to all parties, including Shambaugh.

In pertinent part, § 8.03.3 of the general conditions states that final payment "shall constitute a waiver of all claims by the University except those arising from: . . . (2) faulty or defective work appearing after completion; [and] (3) failure of the work to comply with the requirements of the Contract Documents." In this case, final payment was made on September 21, 2000. Thus, only the claims listed in § 8.03.3 survived after that date.

Section 8.04, entitled "guarantee," states that Turner "*unconditionally guarantees* the Work under this Contract to be in conformance with the Contract Documents and to be *free of defects in workmanship and materials* not inherent in the quality required or permitted [by the Contract Documents] *for a period of two years* from the date of Substantial Completion, unless a longer guarantee period is stipulated in the Contract Documents." In this case, the date of

substantial completion was September 1, 2000. Thus, the two-year warranty expired on September 1, 2002.

Additionally, on August 18, 2000, Shambaugh provided its own two-year guarantee "against failures of workmanship, materials, etc., in accordance with the requirements of the specifications." That warranty expired on August 18, 2002.

As argued by defendants, the contract must be read as a whole, giving effect to all of its terms. Plaintiffs argue that §§ 8.03.3 and 8.04 are in conflict and are susceptible to differing interpretations, and note that they do not explicitly refer to each other. Contrary to plaintiffs' argument, however, there is no requirement that contract provisions specifically refer to each other in order to be read together and to be given effect as a whole. Rather, clear and unambiguous provisions must be enforced as written. *Quality Products*, *supra* at 375; *Klapp*, *supra* at 468.

Article 8 of the general conditions contains a detailed procedure addressing not only progress payments, but the steps a contractor must follow to declare substantial completion, followed by inspections, punchlists, re-inspections, and a demand for final payment—all designed to identify and remedy existing defects before final payment. This contractual procedure culminates in § 8.03.3, final payment, which waives *all claims* except those specifically listed, including claims for "faulty or defective work *appearing after completion*." (Emphasis added.) Section 8.04 follows, setting out an unconditional two-year warranty, and containing a detailed procedure for notifying a contractor of later-appearing defects, demanding that the work (and adjacent work) be repaired or replaced, and addressing emergencies.

These sections must be read together, as a harmonious whole. Read together, §§ 8.03.3 and 8.04 clearly and unambiguously provide that final payment waives all claims except those specifically listed—including claims for "faulty or defective work appearing after completion" and noncompliance with the contract—which claims are covered by the two-year guarantee. There is no language suggesting that plaintiff can assert a claim for faulty or defective work after the expiration of the prescribed warranty. If plaintiff could do so, the warranty expiration date would be rendered meaningless.

The guarantee provided by § 8.04 expired in September 2002, while Shambaugh's express guarantee expired in August 2002. The alleged defects in workmanship and materials were not discovered until January 2006, more than three years after the expiration of these warranties. Under the clear and unambiguous terms of the parties' contract, at the time Shambaugh's allegedly "faulty or defective work" was discovered, the warranties had expired and plaintiff could no longer assert a claim for defective workmanship and materials. Thus, plaintiffs' claims are precluded. See *Cree Coaches, Inc v Panel Suppliers, Inc*, 384 Mich 646, 647-650; 186 NW2d 335 (1971).[2]

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[2] The only exception identified by *Cree*, concerning contracts of adhesion, was repudiated by our Supreme Court in *Rory v Continental Ins Co*, 473 Mich 457, 488-491; 703 NW2d 23 (2005). (continued…)

Plaintiffs argue that this Court has held that disclaimers of liability are ineffective against claims of gross negligence. See *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). It is true that the execution of a general release will not ordinarily bar a claim of gross negligence or willful and wanton misconduct. *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002). However, what is at issue in this case is the timing of the expiration of certain contractual warranties—not the interpretation of a general disclaimer of liability. Plaintiffs cannot avoid the expiration of the contractual warranties simply by claiming that defendants were grossly negligent.

Moreover, the gross negligence claim asserted by plaintiffs in this case sounded exclusively in tort. A party may not assert a tort claim based on the breach of a contractual duty. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). In addition, plaintiffs have represented, both below and on appeal, that they are no longer pursuing any tort claims—only contract claims. Thus, to the extent that plaintiffs argue that they were entitled to recovery on a separate theory of gross negligence, any such argument must fail.

For these reasons, the trial court erred by denying defendants' motion for summary disposition. Defendants were entitled to summary disposition of plaintiffs' claims based on the expiration of the contractual warranties. And because the terms of the parties' contracts are not disputed and defendants were entitled to summary disposition on the basis of a legal issue, further discovery would not have stood a fair chance of providing factual support for plaintiffs' position. Defendants are entitled to entry of judgment in their favor notwithstanding the fact that discovery was not completed.

In light of our decision, and plaintiffs' waiver of any tort claims, it is unnecessary to address the remaining issues raised on appeal.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens

(…continued)

The *Rory* Court held that, absent "traditional contract defenses, such as fraud, duress, unconscionability, or waiver," unambiguous contract provisions are enforceable as written, regardless of the reasonableness of the terms or the relative strength of the parties' bargaining power. *Id*. at 488-489.