

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

OLD REPUBLIC INSURANCE CO.,)	
)	
Plaintiff/Counter-Defendant,)	
)	
v.)	No. 15-CV-03524
)	
KENNY CONSTRUCTION CO.,)	Judge John J. Tharp, Jr.
)	
Defendant/Counter-Plaintiff.)	
)	

MEMORANDUM OPINION AND ORDER

This is an insurance dispute arising from Chicago’s Deep Tunnel flood control project.¹ Kenny Construction Company was the general contractor on a portion of the project for the United States Army Corps of Engineers. Kenny hired Mecon Industries, Inc. as a subcontractor and executed a subcontract requiring Mecon to furnish Commercial General Liability insurance certificates listing Kenny as an additional insured. Mecon procured insurance from Old Republic. Years after the relevant portion of the project was completed, a leak was discovered and the Army Corps of Engineers issued a decision holding Kenny and the project’s designer jointly and severally liable for damage attributed to Mecon’s use of an alternative part (a clamp) in completing its work. Old Republic then filed suit, seeking a declaratory judgment that it had no duty to defend or indemnify Kenny under the Mecon-Old Republic insurance policies. Kenny filed a counterclaim seeking a declaration that Old Republic does in fact have a duty to defend and indemnify it. Both parties have moved for summary judgment. After due

¹ “The Deep Tunnel is intended to ‘bottle a rainstorm’ by channeling storm water that overflows from sewers into the system’s tunnels, which are up to 33 feet in diameter. The tunnels will connect with massive reservoirs, which are to be finished in the early 21st Century. When complete, the system will have a capacity of 41 billion gallons.” Casey Bukro, *Deep Tunnel Opens*, CHICAGO TRIBUNE (Jan. 3, 2008) <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagoday-deeptunnel-story-story.html>.

consideration, the Court concludes that although Old Republic has no duty to defend Kenny, Old Republic is nonetheless obligated to indemnify Kenny.

BACKGROUND

The United States Army Corps of Engineers (USACE) was responsible for the design and construction of the Chicago Underflow Plan McCook Distribution Tunnel System Project in Chicago. USACE hired MWH Global to design a flood control system for the McCook Project and hired Kenny Construction Corporation as the project's general contractor. Kenny subsequently entered into a subcontract with Meccon Industries, Inc. to perform mechanical work and furnish materials for the project.

The subcontract between Kenny and Meccon contains two provisions discussing Meccon's insurance obligations. Paragraph 1.H states:

Submittal of the subcontractor's evidence of insurances shall include the contractor, the owner and any other additional insureds as required per the Insurance Requirement Sheet attached hereto. Subcontractor expressly understands and agrees that its insurance shall serve as primary and non-contributory and the additional insured's insurance will only apply in excess of any and all coverage provided by the subcontractor, notwithstanding any policy language or endorsement(s) to the contrary.

Subcontract, ECF No. 1-1. Notwithstanding the reference to it in the subcontract, neither Kenny nor Meccon has been able to locate the Insurance Requirement Sheet, although Kenny has submitted a sample Insurance Requirement Sheet. The sample Insurance Requirement Sheet instructs a generic subcontractor to "state all information below on your certificate." Sample Ins. Requirements Sheet, ECF No. 54-3. One piece of the information required by the sample form reads: "Additional Insureds: Kenny Construction Company." *Id.*

The second subcontract provision detailing Meccon's insurance obligations is Article 11, which reads:

The Subcontractor will obtain and submit to the General Contractor, before any work is performed under this contract, certificates from the subcontractor's insurance carriers indicating coverage for the following: . . . Commercial General Liability to cover the indemnity agreement in Article 10a through 10c above, although the existence of insurance shall not be construed as limiting the liability of the Subcontractor under this contract. . . . The certificates and the insurance companies shall be subject to the approval of the General Contractor and shall contain provisions for 30 days prior notice of any important change in or cancellation of the insurance. Should the Sub-contractor fail to submit the certificates required, the General Contractor may take such steps as deemed necessary to provide proper protection and charge all costs incurred to Subcontractor.

Subcontract, ECF No. 1-1.

Meccon procured Commercial General Liability insurance policies ("CGL policies") from Old Republic Insurance Co. from 2002 to 2010, and provided corresponding insurance certificates to Kenny between 2002 and 2007. The certificates each list Kenny as an additional insured under the policies. Nonetheless, the certificates also note, in capital letters, that they were "issued as a matter of information only and confer[] no rights upon the certificate holder." Ins. Certificates, ECF No. 54-4. Each certificate further notes that it "does not amend, extend or alter the coverage afforded by the policies below." *Id.* The reverse side of the certificates include further disclaimers to the effect that the certificates do not control the coverage provided by the applicable policies and that the designation of the certificate holder (Kenny) "does not confer rights to the certificate holder in lieu of" an additional insured endorsement on the policy. *Id.*

The relevant Old Republic policies do not expressly identify Kenny as an additional insured. They list Meccon as a named insured and contain endorsements defining "[a]ll persons or organizations as required by written contract or agreement" to be additional insureds. Old Republic-Meccon Policies, ECF Nos. 25-29. Although the policies contain separate endorsements for ongoing operations and completed operations coverage, the definition of additional insureds is identical in each endorsement.

As for coverage, under the policies, Old Republic agreed to pay “those sums that the insured becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies.” *Id.* Old Republic also had “the right and duty to defend the insured against any ‘suit’ seeking those damages.” *Id.* The policies contain an exclusion for damages that arise “by reason of the assumption of liability in a contract or agreement,” although Old Republic would still be required to pay those damages that would have arisen “in the absence of the contract or agreement.” *Id.*

During the course of Meccon’s work on the McCook Project, it twice submitted a variation request to Kenny to substitute an alternative part known as a Smith-Blair clamp for parts called for by the project’s original plans. On both occasions, Kenny sent the request to USACE and MWH Global, both of which approved the changes. Meccon subsequently installed the Smith-Blair clamps after each approval. The project moved forward without incident for some time, and Kenny substantially finished its work on the project in April 2009. In August 2010, USACE issued a final inspection and acceptance letter to Kenny indicating that all construction work had been completed in accordance with contractual requirements and that “no deficiencies remained.”

Notwithstanding issuance of the final inspection and acceptance letter to Kenny, USACE had discovered in October 2008 leaks in the concrete monolith allowing Combined Sewer Overflows (“CSO’s”) to escape and corrode various mechanical and electrical equipment within the Tunnel complex. Over the course of the next two years, USACE and various contractors investigated the cause of the leaks and concluded that the use of the Smith-Blair clamp in lieu of welded joints had caused the problem because the clamps were not rated to withstand the operating fluid pressures within the Tunnel; original specifications called for minimum pressure

ratings for couplings, flanges, and valves of 300 psi, but the Smith-Blair clamps were rated for a maximum pressure of 40 psi. After taking remedial action to solve the problem, USACE issued a contracting officer's "Final Decision" in September 2014 concluding that MWH Global and Kenny were jointly and severally liable for damages caused by "negligent submittal and approval of the variation request to use the Smith Blair clamp in the McCook Distribution Tunnel System." Final Decision 1, ECF No. 54-5. The Final Decision awarded \$11,317,141.76 in property damages to the USACE. Kenny appealed the Final Decision to the Board of Contract Appeals. Before the appeal was resolved, Kenny and USACE settled, with Kenny agreeing to pay USACE \$100,000. Settlement Agreement, ECF No. 84-1.²

After being notified of the Final Decision, Old Republic filed this action seeking a declaratory judgment that it had no duty to defend or indemnify Kenny with regard to the Final Decision. Kenny filed a counterclaim seeking a declaratory judgment that Old Republic has a duty to defend and indemnify Kenny under the policies. Old Republic and Kenny now each move for summary judgment.

DISCUSSION

Under Illinois law, the court's "primary duty in construing an insurance contract is to ascertain and give effect to the intentions of the parties as expressed in the agreement." *Westfield Ins. Co v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 733, 948 N.E.2d 115, 118 (Ill. App. Ct. 2011). "If insurance policy terms are clear and unambiguous, they must be enforced as written." *Id.* A mere disagreement over the meaning of a policy term does not render it invalid; "[r]ather,

² After briefing on the parties' summary judgment motions was completed, the parties moved to supplement the record to include the settlement agreement between Kenny and USACE and accompanying stipulated facts. ECF No. 84. That motion is granted. The court includes the settlement agreement and additional stipulated facts in the summary judgment record.

an ambiguity will be found where the policy language is susceptible to more than one interpretation.” *Id.* In essence, “the principles involved in the interpretation and construction of insurance contracts are the same as those involved in construing other contracts.” *Carey v. Am. Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 278, 909 N.E.2d 255, 260 (Ill. App. Ct. 2009). *See also Schuchman v. State Auto Property and Cas. Ins. Co.*, 733 F.3d 231, 235 (7th Cir. 2013) (“[I]n construing the policy, our primary objective is to ascertain and give effect to the parties’ intentions as expressed by the words of the policy. Like any contract under Illinois law, an insurance policy is construed according to the plain and ordinary meaning of its unambiguous terms.”) (internal citations and quotation marks omitted).

Old Republic argues that under the terms of its insurance policies with Meccon, Kenny is not an additional insured, relieving Old Republic of the obligation to defend and indemnify Kenny. It maintains that Kenny is not a “person[] or organization[] [] required by written contract or agreement” to be an additional insured because the Kenny-Meccon subcontract did not require Meccon to make Kenny an additional insured on its CGL policy but required only that Meccon provide Kenny with certificates of insurance listing Kenny as an additional insured. And pointing to the certificates it provided, Old Republic maintains that they were informational only and “confer[] no rights upon the certificate holder.” ECF 54-4. Old Republic also maintains that even if Kenny is an additional insured under the policy, it owes no duty to defend or indemnify Kenny in the present case due to a variety of other provisions and exclusions in the Meccon-Old Republic insurance policy. The court addresses each of these arguments in turn.

I. Is Kenny An Additional Insured?

In arguing that Kenny is not an additional insured under the Meccon-Old Republic CGL policy, Old Republic principally relies on *West Bend Mut. Ins. Co. v. Athens Const. Co., Inc.*,

