STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY ZAHN,

Plaintiff,

v

KROGER COMPANY OF MICHIGAN,

Defendant/Cross-Plaintiff-Appellee,

and

F. H. MARTIN CONSTRUCTION COMPANY,

Defendant/Cross-Defendant/Third-Party Plaintiff-Appellee,

and

CIMARRON SERVICES, INC.,

Third-Party Defendant-Appellant.

UNPUBLISHED
March 27, 2008

No. 274994
Genesee Circuit Court
LC No. 04-079555-NO

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Third-party defendant Cimarron Services, Inc. ("Cimarron"), appeals as of right from a judgment in favor of third-party plaintiff, F. H. Martin Construction Company ("F. H. Martin"), following a bench trial. We affirm.[1]

[1] F. H. Martin questions whether this Court has jurisdiction over this appeal. Although F. H. Martin agrees that Cimarron's December 12, 2006, claim of appeal was filed within 21 days after entry of the trial court's November 29, 2006, order denying Cimarron's motion for a new trial, it observes that Cimarron filed its motion for a new trial on October 11, 2006, *before* the trial court entered the October 17, 2006, order of judgment. Because the new trial motion was not filed within 21 days *after* the October 17, 2006, order of judgment, F. H. Martin argues that Cimarron
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This case arises from a construction accident on a project involving the renovation of a Kroger store in Flushing, Michigan. F. H. Martin was the general contractor for the project and Cimarron was a subcontractor. A Cimarron employee, Timothy Zahn, was injured when he fell from scaffolding while installing drywall at the construction site. Zahn brought a negligence action against Kroger and F. H. Martin. Kroger filed a cross claim against F. H. Martin for indemnification, and F. H. Martin filed a third-party complaint against Cimarron, seeking indemnification under its subcontract agreement.

This appeal is limited to F. H. Martin's third-party action against Cimarron. F. H. Martin's subcontract agreement with Cimarron contained the following indemnification clause:

> Indemnity - To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold Martin, the Owner and Others (required by the Contract Documents) harmless from all claims for bodily injury and property damage that may arise from the performance of the Subcontract work to the extent of the negligence attributed to such acts or omissions by Subcontractor, or anyone employed or contracted by Subcontractor for whose acts any of them may be liable. In no event shall the indemnity contained herein be deemed to cover damages arising exclusively through the negligence of Martin.

In addition, the agreement stated that Cimarron "assume[d] every duty imposed upon Martin," without any limitation. The trial court denied Cimarron's motion for summary disposition

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may not rely on MCR 7.204(A)(1)(b) to argue that its appeal was timely filed.

This Court has jurisdiction of an appeal of right from a final order or judgment. MCR 7.203(A)(1). A "final judgment" or "final order" is defined as "the first judgment or order that disposes of all claims and adjudicates the rights and liabilities of all parties[.]" MCR 7.202(6)(a)(1). An appeal of right in a civil action must be filed within 21 days after entry of the order appealed from, or within 21 days after entry of an order denying a motion for a new trial if the motion was filed within the initial 21-day appeal period. MCR 7.204(A)(1)(a) and (b).

Cimarron argues that it filed its motion for a new trial within 21 days after the trial court issued its September 29, 2006, opinion and, therefore, its claim of appeal, filed less than 21 days after the court denied its motion for a new trial, was timely under MCR 7.204(A)(1)(b). We disagree with Cimarron, however, that the September 29, 2006, opinion qualifies as a final order or judgment. Although the opinion sets forth a formula for determining a judgment amount, it did not determine that amount, which was not first established until entry of the October 17, 2006, order of judgment. Thus, the opinion does not qualify as a final order or judgment under MCR 7.202(6)(a)(1).

But because the motion for a new trial was filed before the trial court entered the October 17, 2006, judgment, and because that judgment did not resolve the new trial motion, which remained pending, the judgment did not dispose of all claims in the case. Thus, it too did not qualify as a final order or judgment as defined in MCR 7.202(6)(a)(1). In this situation, the November 29, 2006, order denying Cimarron's motion for a new trial was the first order to dispose of all claims. Because Cimarron filed its claim of appeal within 21 days after entry of the order denying its motion for a new trial, this Court has jurisdiction over this appeal. MCR 7.204(A)(1)(a).

pursuant to MCR 2.116(C)(10). After a bench trial, the trial court determined that both F. H. Martin and Cimarron were negligent, but that Cimarron's negligence was more active because it directed Zahn's labor and ordered him onto the scaffolding after he protested that it was unsafe. The trial court determined that Cimarron's actions constituted "negligence attributed to such acts or omissions by Subcontractor" under the indemnity clause. The trial court also concluded that F. H. Martin was negligent for failing to inspect the scaffolding for safety rails or to take steps to make it safer for Zahn, and that Cimarron was not required to indemnify F. H. Martin to the extent of F. H. Martin's negligence. The trial court determined that F. H. Martin was 20 percent negligent and that Cimarron was 80 percent negligent, and ordered Cimarron to indemnify F. H. Martin for 80 percent of all sums it had paid in setting the claims of Zahn and Kroger. The trial court subsequently denied Cimmaron's motion for a new trial.

On appeal, Cimmaron argues that the trial court erred in denying its motion for summary disposition. We disagree.

This Court reviews de novo a circuit court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Cimarron argues that the trial court erred in its interpretation of the indemnity agreement. The interpretation of a contract is a question of law that is reviewed de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). "An indemnity contract is construed in the same fashion as are contracts generally." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). An indemnity contract should be construed to ascertain and give effect to the intentions of the parties and should be interpreted to give a reasonable meaning to all of its provisions. *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). "Where the language of the document is clear and unambiguous, interpretation is limited to the actual words used. . . . An unambiguous contract must be enforced according to its terms." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004) (citations omitted). "Where parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract." *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004).

The indemnification agreement clearly states the circumstances under which Cimarron is required to indemnify and defend F. H. Martin. The agreement requires Cimarron to indemnify and defend F. H. Martin for "all claims for bodily injury. . . that may arise from the performance of the Subcontract work." Thus, indemnification is required when (1) there is a claim for bodily injury, that (2) arises from the performance of the subcontract work. Both of these conditions were satisfied. Zahn made a claim for bodily injury by filing this lawsuit, and it is undisputed that his claim arose from the performance of the subcontract work.

We recognize that the indemnification agreement limited Cimarron's obligation to indemnify F. H. Martin only "to the extent of the negligence attributed to such acts or omissions by [Cimarron or its employees]" and "[i]n no event shall the indemnity contained herein be deemed to cover damages arising exclusively through the negligence of Martin." However, persuasive evidence was presented attributing negligence to Cimarron or its employees. Therefore, the indemnity provision is applicable and the trial court properly denied Cimarron's motion for summary disposition.[2]

Cimarron further argues that the trial court erred in denying its motion for a new trial. We review the trial court's decision for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006).

Although Cimarron asserts that the trial court inaccurately characterized its position at trial, Cimarron has not shown that the court erred in its interpretation or application of the indemnity agreement. Further, in order to properly limit Cimarron's indemnity obligation, the court was required to determine the extent of negligence attributable to Cimarron and its employees. Because Cimarron failed to show that the trial court's bench trial decision was contrary to law, and also failed to establish a mistake of fact by the court entitling it to relief, the trial court did not abuse its discretion by denying the motion for a new trial or other relief.

We affirm.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood

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[2] We note Cimarron's argument that imposing indemnification liability against it is contrary to the statutory abolition of joint liability, MCL 600.2956. However, the liability imposed on Cimarron as a result of the agreement it made with F.H. Martin is several, in the sense that it did not exceed the percentage share of fault attributed to Cimarron by the fact finder. Further, arguments similar to Cimarron's have been rejected by our Supreme Court in *Gerling Konzern Allegemeine Versicherungs AG v Regents of the University of Michigan*, 472 Mich 44, 51-52; 693 NW2d 149 (2005). Moreover, our Court has determined that MCL 600.2956 does not apply to contract actions like this as it is expressly limited to "tort actions or 'another legal theory seeking damages for personal injury, property damage or wrongful death.'" *Laurel Woods Apartments v Najah Roumayah,* 274 Mich App 631, 641-642; 734 NW2d 217 (2007).