NO. COA13-313
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

FRYE REGIONAL MEDICAL CENTER, INC.,
Plaintiff,

v.

Mecklenburg County
No. 11 CVS 22084

HOSTETTER & KEACH, INC.,
Defendant, and

PERFORMANCE FIRE PROTECTION, LLC,
Defendant and Third Party Plaintiff,

v.

MCCULLOCH ENGLAND ARCHITECTS ASSOCIATES, INC. AND MCCRACKEN & LOPEZ, P.A.

Appeal by Performance Fire Protection, LLC, from orders entered 5 October 2012 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2013.

Hamilton Stephens Steele & Martin, PLLC, by David B. Hamilton and Adrianne Huffman Chillemi, for McCulloch England Architects Associates, Inc. and McCracken & Lopez, P.A. – appellees.

Teague Campbell Dennis & Gorham, LLP, by Bryan T. Simpson, for Performance Fire Protection, LLC – appellant.

McCULLOUGH, Judge.

Third-party plaintiff Performance Fire Protection, LLC, appeals from a trial court's orders dismissing its claim for contribution against third-party defendant McCulloch England Architects Associates, Inc., and dismissing its claims for indemnification against third-party defendants McCulloch England Architects Associates, Inc., and McCracken & Lopez, P.A. For the reasons stated below, we affirm the orders of the trial court.

I. Background

On 3 December 2011, plaintiff Frye Regional Medical Center, Inc. ("Frye"), filed a complaint against defendants Hostetter & Keach, Inc. ("Hostetter") and Performance Fire Protection, LLC ("Performance"). The complaint alleged that in August 2008, Frye, a corporation in the business of providing medical services, was in the process of building a new EP laboratory which included the "remodeling of existing space and the installation of new equipment at the hospital facility." To complete the necessary work, Frye contracted with Hostetter to serve as the general contractor for the project.

Remodeling the new EP lab required that piping for the existing fire suppression system be moved. Some of these pipes that had to be moved were part of a "wet" fire suppression system, meaning that water constantly flowed through the pipes. Frye alleged that defendants "knew or should have known that before the pipes could be cut and moved, the water to the pipe system had to be shut off and the pipes drained, otherwise when the pipes were cut, water would flood the building and the new EP lab."

The complaint further alleged that Hostetter hired Performance as its subcontractor to perform all the work associated with moving the fire suppression system pipes and putting the system back into service upon completion of the work. When Performance began removing pipes from the existing fire suppression system, the new equipment for the EP lab had been delivered to Frye and was located within the new EP lab. At some point around 8 December 2008, Performance needed to cut part of the existing fire suppression system pipes but neither Hostetter nor Performance ensured that the water was shut off to the suppression system or that the water was fully drained from the suppression system. Because Hostetter and Performance failed to stop the flow of water into the fire suppression

system pipes, Frye alleged that when Performance cut the pipe serving the system, water flooded Frye's building. The water flooded the new EP lab causing damage to the building, its components, and its new and existing equipment, as well as causing a delay in construction of the EP lab.

Based on the foregoing, Frye's complaint contained claims of negligence and breach of implied warranty of service against both Hostetter and Performance, and a claim of breach of contract against Hostetter.

On 27 April 2012, Performance filed a Third Party Complaint against McCulloch England Associates Architects, Inc. ("MEAA") and McCracken & Lopez, P.A. ("M&L"). The Third Party Complaint alleged that MEAA had contracted with Frye to provide architectural, planning, and professional design services and that M&L had contracted with Frye to provide professional engineering services in connection with the construction of the EP lab. MEAA provided "architectural advice, architectural drawings, structural calculations, architectural recommendations, and reviewed and/or approved or failed to review or approve, items pertaining to the design and construction of the fire suppression system associated with the Renovation Project." M&L provided "engineering advice,

engineering drawings, structural calculations, engineering recommendations, and reviewed and/or approved or failed to review or approve, items pertaining to the design and construction of the fire suppression system associated with the Renovation Project." The Third Party Complaint contained claims of negligence, breach of contract, indemnity, and contribution.

On 11 July 2012, M&L and MEAA filed motions to dismiss Performance's Third Party Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Following a hearing, on 5 October 2012, the trial court entered an order dismissing all of Performance's claims against MEAA. The trial court also entered an order granting M&L's motion to dismiss the claims of negligence, breach of contract, and indemnity contained within Performance's Third Party complaint with prejudice, leaving Performance's contribution claim against M&L intact. Performance appeals.

II. Standard of Review

"[O]ur Court conduct[s] a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation and quotation marks omitted).

"In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citation and quotation marks omitted). A complaint is without merit if "(1) the complaint on its face reveals that no law supports the plaintiffs' claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats the plaintiffs' claim." *Kaleel Builders, Inc., v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 473 (2003) (citation omitted).

III. Discussion

A. Motion to Dismiss Appeal

As a preliminary matter, we address MEAA and M&L's motion to dismiss as referred to our panel. MEAA and M&L have filed this motion arguing that Performance's appeal is interlocutory and does not affect a substantial right.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments. An interlocutory order is one made during the pendency of an action, which does not

dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Clements v. Clements*, __ N.C. App. __, __, 725 S.E.2d 373, 375-76 (2012) (citations omitted). Here, Performance's contribution claim against M&L is left intact.

> However, an interlocutory order is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Currin & Currin Const., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (citation omitted).

Because the trial court in the present case did not certify its orders pursuant to Rule 54(b), we must now consider whether this interlocutory appeal affects a substantial right which would be lost absent immediate review. "A substantial right is affected when (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Babb v. Hoskins*, __ N.C. App. __, __, 733 S.E.2d 881, 883 (2012) (citation omitted). "[I]t is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in

which the order from which appeal was sought is entered." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (citation omitted).

In the present case, the same factual issues would be present in both trials. Performance's third party complaint alleged that MEAA submitted architectural and engineering plans, drawings, calculations, construction specifications, advice, and recommendations for the fire suppression system and that M&L submitted to Frye, MEAA, and Hostetter a set of engineering drawings, structural calculations, construction specifications, advice and recommendations regarding the design and specifications of the renovation project. Performance alleged that MEAA and M&L knew or should have known that their submitted work would be relied upon by Performance.

Absent immediate review, the principal case would proceed to trial on Frye's claims against Hostetter and Performance and Performance would pursue its contribution claim against M&L. If a jury determines that Performance was negligent, Performance will then be able to pursue an appeal of the dismissal of its contribution and indemnity claims against MEAA and its indemnity claim against M&L. If Performance is successful in obtaining a reversal of the dismissal of its indemnity claim against M&L and

its other claims against MEAA, Performance will be forced to have a second trial against M&L for indemnity and MEAA for contribution and indemnity. Performance would have to establish that it was jointly liable with MEAA for Frye's damages in order to be successful on the contribution claim. *See* N.C. Gen. Stat. § 1B-1(a) (2011) (states that "where two or more persons become jointly or severally liable in tort for the same injury to person or property . . . , there is a right of contribution among them even though judgment has not been recovered against all or any of them."). MEAA could argue that Performance was not negligent in causing Frye's damages in order to overcome Performance's contribution claim. Performance would undergo a second trial on whether it was negligent in causing Frye's damages, creating a possibility of an inconsistent verdict and thus, implicating a substantial right. Based on the foregoing, MEAA and M&L's motion to dismiss Performance's appeal is denied.

B. Contribution claim against MEAA

Performance first argues that the trial court erred by dismissing its claim for contribution against MEAA. We disagree.

The right of contribution in North Carolina is governed by N.C. Gen. Stat. § 1B-1, part of the Uniform Contribution Among Tort-Feasors Act, which states the following:

> Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to . . . property[,] there is a right of contribution among them even though judgment has not been recovered against all or any of them.

N.C.G.S. § 1B-1(a) (2011).

> Two or more parties are joint tortfeasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. The burden is on the tortfeasor seeking contribution to show that the right exists, and to allege facts which show liability to the injured party as well as a right to contribution.

State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 470, 380 S.E.2d 100, 102-103 (1989) (citations omitted).

Our Court has indicated that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Kaleel*, 161 N.C. App. at 42, 587 S.E.2d at 476 (citation omitted). "[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to

properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." *Id.* at 43, 587 S.E.2d at 476 (citation omitted).

The Supreme Court set out in *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), four categorical exceptions to this general rule:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee. . . .
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee. . . .
>
> (3) The injury, proximately caused by the promisor's negligent, or willful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.
>
> (4) The injury so caused was a willful injury to or a conversion of the

> property of the promisee, which was the subject of the contract, by the promisor.

Id. at 82, 240 S.E.2d at 350-51 (citations omitted).

We find the case *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 587 S.E.2d 470 (2003), instructive. The plaintiff Kaleel Builders, a general contractor, was hired by Pier Giorgio and Paula A. Andretta ("Andrettas") to construct a residence. The plaintiff entered into agreements with several contractors to provide such things as labor and materials for the application of the hard coat stucco exterior, to perform framing on the residence, etc. The Andrettas contracted directly with an architect to provide architectural services on the residence. Sometime later, construction of the house was halted and the Andrettas filed a demand for arbitration against the plaintiff for allegedly defective construction including the work of the subcontractors and the design/construction supervision of the architect. *Id.* at 37, 587 S.E.2d at 473. The plaintiff filed a complaint against the subcontractors for breach of contract, breach of warranty, negligence, and indemnification or, in the alternative, contribution, and against the architect for negligence and indemnity, or in the alternative, contribution.

The trial court dismissed the claims against the subcontractors and granted summary judgment in favor of the architect. *Id.*

Our Court noted that the architect was in contractual privity with the Andrettas and that the plaintiff was in contractual privity with the Andrettas. "Therefore, as to the subject matter of the contract and performance thereunder in these two relationships, the contract governs, and we recognize no injuries sounding in tort flowing from either [the architect] or [the] plaintiff to the Andrettas." *Id.* at 46, 587 S.E.2d at 478. Because there was no issue of fact as to whether the architect and the plaintiff were joint tort-feasors, our Court affirmed the granting of summary judgment in favor of the architect on the issue of contribution. *Id.*

In the case *sub judice*, Performance alleged in its Third Party Complaint that MEAA contracted with Frye to provide architectural, planning, and professional design services in connection with the renovation of the EP lab. Performance further alleged that MEAA "reviewed and/or approved or failed to review or approve, items pertaining to the design and construction of the fire suppression system associated" with the renovation.

The foregoing allegations support the well-established rule that "the law of contract, not the law of negligence, defines the obligations and remedies of the parties." *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 883, 602 S.E.2d 1, 3 (2004). Because Frye cannot recover from MEAA based on a tort based claim, MEAA cannot be a joint tortfeasor and Performance's contribution claim must fail. Moreover, Performance does not argue that any of the four exceptions recognized in *Ports Authority* is applicable to the present case. Thus, we affirm the trial court's dismissal of Performance's contribution claim against MEAA.

C. Indemnity Implied-in-Law Claims against MEAA and M&L

Next, Performance argues that the trial court erred by dismissing its claims for indemnity implied-in-law against both MEAA and M&L. We disagree.

"In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law." *Kaleel*, 161 N.C. App. at 38, 587 S.E.2d at 474 (citations omitted).

> An implied-in-law contract for indemnification is generally based upon the

> doctrine of primary-secondary liability. Where a passively negligent tortfeasor has discharged an obligation for which the actively negligent tortfeasor was primarily liable, as a matter of fairness, the actively negligent tortfeasor may be found to have made an implied promise to indemnify the passively negligent tortfeasor.

Charlotte Motor Speedway v. Tindall Corp., 195 N.C. App. 296, 302-303, 672 S.E.2d 691, 695 (2009) (citations and quotation marks omitted).

> Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff; *and* (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

Kaleel, 161 N.C. App. at 41, 587 S.E.2d at 475 (citation omitted).

In the present case, Performance alleged that MEAA and M&L were negligent by

> a. Failing to design the subject fire suppression system associated with the Renovation Project appropriately and reasonably by failing to properly depict the existing system that was to be modified, and by failing to provide for the appropriate installation and location of the fire suppression system associated with the Renovation Project;

b. Providing insufficient, defective, and negligently prepared architectural and/or engineering plans, drawings, architectural and/or engineering calculations, construction specifications, advice, and recommendations that lead to necessary work not being performed appropriately or correctly by other contractors, subcontractors, and their employees;

c. Failing to provide appropriate architectural and/or engineering guidance, oversight, and control during project meetings, and when it was determined that a portion of the existing fire suppression system was ordered to be relocated due to its proximity to new electrical panels;

d. Through such other ways which may be discovered through discovery and trial.

Furthermore, Performance alleged that the negligence of MEAA and M&L was the "active and primary cause of any injury or damages sustained by [Frye], and any alleged, but denied, negligence of [Performance] was secondary and passive, and as such [Performance] is entitled to indemnity from MEAA and M&L[.]"

Reviewing Performance's allegations stated in its Third Party Complaint, we hold that they are insufficient to state a claim for indemnification implied-in-law against both MEAA & M&L. MEAA and M&L were in contractual privity with Frye. Similar to our previously discussed contribution analysis, we do not recognize a claim in tort where an underlying contract governs the rights and the duties between the parties. *See*

Ports Authority, 294 N.C. 73, 240 S.E.2d 345. Because MEAA and M&L are accountable in their contract with Frye, Frye does not have a claim in tort against MEAA or M&L, and therefore, "the parties do not fit the active-passive tort-feasor framework required to support an equitable right to indemnity implied-in-law[.]" *Kaleel*, 161 N.C. App. at 47, 587 S.E.2d at 479. We affirm the trial court's orders granting MEAA and M&L's motion to dismiss Performance's claims of indemnification implied-in-law.

Affirmed.

Judges McGEE and DILLON concur.

Report per Rule 30(e).