STATE OF MICHIGAN

COURT OF APPEALS

ALLEN LANGFORD, as Next Friend for PATRINA LANGFORD, a Minor,

Plaintiff,

v

JENKINS CONSTRUCTION, INC., TMP ASSOCIATES, GEORGE COHEN, DETROIT PUBLIC SCHOOLS, CASS TECHNICAL HIGH SCHOOL, DETROIT PUBLIC SCHOOLS PROGRAM MANAGER, L.L.C., QUICK GREEN, B & L LANDSCAPING, and BECKETT & RAEDER, INC.,

Defendants,

and

ABC PAVING COMPANY, INC.,

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

v

INDUSTRIAL FENCE & LANDSCAPE,

Third-Party Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 23, 2009

No. 285915
Wayne Circuit Court
LC No. 06-604007-NO

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant/Third-Party Plaintiff, ABC Paving Company, Inc. ("ABC") appeals as of right the trial court's grant of summary disposition in favor of Third-Party Defendant, Industrial Fence & Landscape ("Industrial") in this contract dispute regarding the applicability of an

indemnification provision. Industrial cross-appeals contending its contract with ABC is void based on fraud. We vacate in part, affirm in part and remand to the trial court.

This litigation arises from an injury incurred by the minor plaintiff, Patrina Langford, while performing as a cheerleader for Cass Technical High School at a game on their football field. Patrina was injured when her hand slipped into a depression in the field resulting in her falling and injuring her arm. Plaintiff sued the school and related entities in addition to the contractors and subcontractors involved in construction of the school and its football field asserting defects in its construction, design and inspection.

At the outset, it is necessary to delineate the relationship between the pertinent contractors and subcontractors. Jenkins Construction, Inc. ("Jenkins") served as the general contractor and construction manager for the Cass Technical High School project. Jenkins subcontracted construction of the football field (referred to as Bid Package 14 – Category I) to ABC. ABC was responsible for laying out the field and placement of topsoil for later installation of sod. In turn, ABC subcontracted the installation of the sod to Industrial. Subsequently, Industrial subcontracted installation of the sod to Quick Green, which then subcontracted the job to B & L Landscaping ("B & L").

The contract between Jenkins and ABC required, in pertinent part, that ABC "furnish all labor, equipment, tools, supervision, materials and appurtenances as necessary to properly furnish and install the work described in Bid Package 14 category I – Athletic Fields." The contract was amended to provide for the furnishing and installation of sod for the football field rather than hydroseeding. In late 2004, Jenkins contacted ABC regarding issues involving the acceptability of the soil provided by ABC for the football field. Purportedly, Beckett & Raeder, Inc. tested the topsoil used by ABC and determined that it was not up to specification. ABC asserts it could not have breached any soil specifications because they were not delineated in the bid package. Although ABC contends the dispute with Jenkins regarding the quality and placement of the topsoil was resolved before ABC subcontracted with Industrial for installation of the sod, questions pertaining to Jenkins actual acceptance of the product provided by ABC is challenged by Industrial in its assertion of a fraud claim for failure to disclose this dispute on cross appeal.

A subcontract dated May 2, 2005, was drafted between Industrial and ABC for installation of sod on the football field. For a total payment of $40,000, Industrial was to "[p]rovide all labor, equipment, tools, materials, transportation, supervision and all else necessary for the complete sod installation on the above referenced project per plans & specifications." The pertinent indemnification language, which is the subject of this appeal, provided:

> The Subcontractor agrees to hold harmless and protect the Prime Contractor and the Owner against all suits and claims for all damages or injuries to any persons or property arising out of any of his work, materials, supplies, subcontracts, employees or any other source.

Industrial contends, from the outset, it was understood that it would not actually install the sod because ABC had previously selected Quick Green to perform this task. Industrial asserts its subcontract with ABC constituted a mere formality to meet ABC's need to have a minority or

female-owned business involved in the project and that there was never an intention to have Industrial perform any work pursuant to the subcontract. The subcontract between Industrial and Quick Green for sod installation is dated May 19, 2005.

On October 17, 2007, Quick Green brought a motion seeking summary disposition asserting the absence of a duty to plaintiff and lack of a genuine issue of material fact establishing their negligence was a proximate cause of plaintiff's injury. The trial court granted Quick Green's motion dismissing plaintiff's claims against it in their entirety. On October 25, 2007, the trial court denied Industrial's motion for summary disposition asserting fraud in the inducement, which was premised on disputes between ABC and Jenkins regarding the acceptability of the topsoil provided by ABC for the football field. Subsequently, the trial court granted Industrial's motion for summary disposition of the third-party complaint based, in part, on its prior determination that Quick Green was not liable and their dismissal from the case. On May 19, 2008, the trial court entered a stipulated order disposing of all pending claims between the remaining parties.

On appeal, ABC asserts the trial court erred in granting summary disposition in favor of Industrial, misinterpreting the applicability of the indemnity provision in the subcontract with ABC. This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597NW2d 817 (1999). This Court also reviews de novo the interpretation of a contract as a question of law, including whether the contractual language is ambiguous and necessitates resolution by the trier of fact. *Mahick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). A contract that is not ambiguous must be enforced in accordance with its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

The subcontract between ABC and Industrial contained an express provision for indemnification. "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 Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686NW2d 756 (2004). "An indemnity contract is construed in the same manner as other contracts." *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). In general, an indemnification provision or contract is strictly construed against the drafting party and the indemnitee. *Triple E Produce Corp v Mastronardi Product, Ltd*, 209 Mich App 165, 172; 530 NW2d 772 (1995). However, as with other types of contracts, the principle of construing an indemnification contract against the drafter only applies when (a) there exists an ambiguity and (2) all other means of construing the ambiguity have been exhausted. See *Klapp v United Ins*, 468 Mich 459, 470-474; 663 NW2d 447 (2003). Hence, "[a]n unambiguous written indemnity contract must be enforced according to the plain and ordering meaning of the words used in the instrument." *DaimlerChrysler, supra* at 185. On appeal, this Court interprets an indemnification provision in a manner that will serve to provide a reasonable meaning to all of the terms contained therein. *MSI Construction Mgrs, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). In essence, an indemnification provision is to be construed to effectuate the intentions of the parties to the contract. The parties' intent is determined through review of the contract language, the parties' situation and circumstances involved in the initiation of the contract. *Triple E Produce Corp, supra* at 172.

The indemnification provision in the subcontract between ABC and Industrial provides:

> The Subcontractor agrees to hold harmless and protect the Prime Contractor and the Owner against all suits and claims for all damages or injuries to any persons or property arising out of any of his work, materials, supplies, subcontracts, employees or any other source.

Contrary to the implication of the trial court's ruling, the indemnification language is very broad in that it permits indemnification for "all suits and claims for all damages or injuries" and does not require proof of actual negligence for the provision to take effect.[1] Clearly, plaintiff's complaint alleges, in several different paragraphs, that her injury is in part related to defects in the sod or its installation on the subject football field. Consequently, ABC is correct in asserting that the trial court's determination of negligence with regard to Quick Green is irrelevant in construing or applying this provision. All that is required, pursuant to the plain language of the indemnification provision is that the claim or suit arises from the work performed, but does not require that such work be done in a negligent manner.

Further, in determining whether the indemnification provision is implicated, assertions pertaining to ABC's negligence are also irrelevant as the contract language specifies that liability arise "out of any of his work, materials, supplies, subcontracts, employees or any other source." Clearly, the "his" referenced is Industrial. Although it is undisputed that Industrial did not perform or provide any "materials, supplies" or "employees" with regard to the installation of the sod that is not dispositive with regard to application of the provision. Industrial did have a "subcontract" with Quick Green, which would cause the provision to be effectuated.

Because of deficiencies pertaining to the content of the lower court record, it cannot be definitively ascertained whether Quick Green actually performed any work with regard to the sod installation or merely subcontracted the entire job to B & L. However, whether any work performed by Quick Green was negligent is irrelevant. Hence, this Court finds that the trial court's grant of summary disposition in favor of Industrial regarding the application of the indemnity provision was premature until a determination was definitively made regarding Quick Green's acts in conformance with its subcontract with Industrial giving rise to plaintiff's claims and the implementation of the indemnification provision. In the alternative, it may be assumed that the trial court's grant of summary disposition in favor of Quick Green based, presumably, on the absence of any negligence, is indicative that Quick Green did perform certain acts or services in furtherance of the sod installation and, thus, is sufficient for implementation of the indemnification provision as arising from its subcontract of Industrial. Under either scenario, this matter requires remand back to the trial court.

We further note that in its appellate brief, Industrial also contends that its subcontract should be rescinded or deemed unenforceable based on a lack or failure of consideration. ABC replies that the subcontract was a "pay when paid" agreement and that because ABC did not receive payment from Jenkins, ABC was not required to remit payment to Industrial. A review of the lower court record does not disclose any rulings by the trial court regarding either the

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[1] In addition, the wording that liability for claims or suits can arise from "any other sources" related to Industrial is indicative of the broad scope or nature of this language.

factual assertions of the parties or their legal position. Thus, the record is insufficient for this Court's review.

On cross-appeal, Industrial contends that its subcontract with ABC, along with the indemnification provision contained therein, should be rescinded or voided based on either fraud in the inducement or material misrepresentations related to the failure of ABC to disclose concerns and ongoing disputes pertaining to the quality of the topsoil provided on the football field prior to the sod installation. To prove fraudulent misrepresentation it must be demonstrated:

> (1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. [*Campbell v Sullins,* 257 Mich App 179, 195; 667 NW2d 887 (2003).]

Based on the pleadings, Industrial's claim must fail. At no point does Industrial ever allege that ABC affirmatively represented or made any statement to indicate the quality of the topsoil. In fact, the basis for Industrial's complaint is clearly that ABC failed to disclose the dispute pertaining to the topsoil, not that it affirmatively misrepresented its quality or condition.

This Court, in *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC,* 276 Mich App 146, 161-162; 742 NW2d 409 (2007), citing *Custom Data Solutions, Inc v Preferred Capital, Inc,* 274 Mich App 239, 242-243; 733 NW2d 102 (2006), discussed the requirements for establishment of a fraud in the inducement claim:

> "[I]n general, actionable fraud must be predicated on a statement relating to a past or an existing fact." *Samuel D Begola Services, Inc v Wild Bros,* 210 Mich App 636, 639; 534 NW2d 217 (1995). However, "Michigan also recognizes fraud in the inducement . . . [which] occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Id.* To establish . . . fraud in the inducement, a party must show that
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> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that is was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." [*Belle Isle Grill Corp v Detroit,* 256 Mich App 463, 477; 666 NW2d 271 (2003) (citation omitted).]

In addition, "'fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party.'" *Rooyakker, supra* at 162, citing *Custom Data Solutions, supra* at 243, quoting *Samuel D Begola Services, supra* at 640. As with Industrial's companion claim, its assertion of fraud in the inducement cannot be sustained based again on the absence of any

actual misrepresentation. Further, Industrial contracted to install sod on topsoil provided by ABC and, hence, was reliant on the quality and appropriateness of that topsoil for the success of its own performance under the subcontract. As such, any purported reliance on ABC's silence regarding the topsoil is patently unreasonable, particularly given that each party to the subcontract was a sophisticated business entity and it is assumed each had previously performed similar contractual obligations and were aware of the risk involved.

In actuality, Industrial's claim is more consistent with an assertion of silent fraud. To establish a claim for silent fraud, Industrial must demonstrate that ABC suppressed a material fact, which it had a legal or equitable duty to disclose. *M & D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). Further, "there must be some type of misrepresentation, either by words or by action." *Id.* at 36. Again, Industrial merely asserts the existence of the duty to disclose but fails to elucidate any misrepresentation made spontaneously by ABC or in response to questioning by Industrial. As such, Industrial's cross-appeal cannot be sustained.

We affirm the trial court's denial of summary disposition regarding Industrial's claims of fraud. We vacate the trial court's ruling granting summary disposition in favor of Industrial and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

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SHAPIRO, J. (*concurring*).

I concur in the reversal of summary disposition and in the order of remand. I write to clarify what matters I believe must be resolved by the finder of fact on remand. The lead opinion suggests that ABC need merely show that that "Quick Green did perform acts or services in

furtherance of the sod installation" and that a satisfactory showing on that narrow issue will be "sufficient for implementation of the indemnification provision." I believe that a broader question must be answered by the fact-finder on remand, namely the issue actually posed by the language of the contract, i.e., whether the cause of the underlying plaintiff's injury "[arose] out of any of [Industrial's] work, materials, supplies, subcontracts, employees or any other source."

I agree with the majority's recitation of the law governing the interpretation of indemnification agreements and that "the extent of the duty must be determined from the language of the contract." *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). Given the language of this indemnification agreement, it can be triggered in the absence of any negligence by Industrial or any subcontractor it hires. However, the agreement is not triggered unless the underlying claim of injury arose out of the scope of work Industrial was hired to do, which the contract sets forth as: "furnish and install sod per plans and specifications". I find no determination by the trial court that the injury arose out of the furnishing or installation of the sod. Further, it is difficult to see how this can be determined without the taking of evidence by a fact-finder given that the record contains evidence that the injury was caused by degeneration of the field resulting from the type of topsoil used by ABC before the sod was placed and not as a result of the furnishing or installation of the sod.

If, in fact, the injury arose out of the "furnish[ing] or install[ation of] the sod per plans and specifications", then regardless of whether it was done negligently and regardless whether it was done by Industrial, its sub-contractor Quick Green or by Quick Green's sub-contractor B & L Landscaping, Industrial must indemnify ABC. However, if the injury did not arise out of the furnishing or the installation of the sod then the indemnification clause is not triggered. Accordingly, I would direct that the finder of fact make that determination upon remand.

/s/ Douglas B. Shapiro