

STATE OF MICHIGAN
COURT OF APPEALS

GRAND RIVER INFRASTRUCTURE, INC.,

Plaintiff- Appellant,

v

KEN SCHAAF BUILDERS, INC.,

Defendant/Cross-Defendant/
Appellee,

and

INTERNATIONAL FIDELITY INSURANCE
COMPANY,

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

and

THRIFTY BUILDING CENTER, INC.,
and KEN A. SCHAAF,

Third-Party Defendants.

Before: McDonald, P.J., and Bandstra and C.L. Bosman*, JJ.

PER CURIAM.

* Circuit judge, sitting on the Court of Appeals by assignment.

UNPUBLISHED

April 25, 1997

No. 183963

Clare Circuit Court

LC No. 93-000333-CK

Plaintiff Grand River Infrastructure, Inc. appeals as of right an order granting defendant International Fidelity Insurance Company (IFIC) summary disposition on Grand River's indemnity claims in Counts II and IV. Third-party defendants Thrifty Building Center, Inc. and Ken Schaaf, as an individual, are not parties to this appeal. We affirm.

This construction bond case arises from Grand River's claims that Schaaf Builders did not pay Grand River for certain work performed on two public highway construction projects and that Grand River was entitled to collect its payment from Schaaf Builders' payment bond, which IFIC provided. The two highway construction projects involved removing the existing bridge and replacing that bridge with a prestressed, post-tensioned single span concrete bridge.

Sometime before January 15, 1992, Grand River submitted separate quotes for each project, offering to provide the prestressed box beams used to construct each bridge deck and to provide the post-tensioning services. On January 15, 1992, the Michigan Department of Transportation (MDOT) declared Schaaf Builders the successful bidder for the two projects, and Schaaf Builders acquired a payment bond from IFIC to assure payment for the materials and labor used in the projects as required under the public works act, MCL 570.101 *et seq.*; MSA 26.321 *et seq.*

On February 18, 1992, Schaaf Builders issued purchase orders to Grand River for each project, and, on March 26, 1992, Schaaf Builders finalized its contract with MDOT, which included the 1990 MDOT standard construction specifications. During April and May 1992, Grand River began casting each project's prestressed box beams, and in July, Grand River performed the post-tensioning work on the beams at each project site. Upon completion of the work, Grand River billed Schaaf Builders a total of \$97,713.83 for the box beams and the post-tensioning services that was never paid.

On January 19, 1993, Grand River notified Schaaf Builders, MDOT, and IFIC that Grand River intended to rely on the bond for payment. The notice was sent at least 178 days after Grand River last supplied materials or performed work on the projects, but within sixty days of MDOT's final estimate or post-final estimate.

On October 7, 1993, Grand River filed a four-count complaint, alleging in Counts I and III that Schaaf Builders breached its contracts with Grand River when Schaaf Builders failed to pay for the work and services performed on each project and seeking recovery on IFIC's payment bond in Counts II and IV. IFIC filed a cross-claim against Schaaf Builders and a third-party complaint against Thrifty Building Center, Inc. and Ken Schaaf, individually, seeking indemnification for any sums ordered to be paid on the bond. These cross-claims remain pending.

Grand River moved for summary disposition against Schaaf Builders on Counts I and III and against IFIC on Counts II and IV. IFIC cross-moved for summary disposition on Counts II and IV, claiming that Grand River was not a subcontractor and that Grand River's untimely notice precluded recovery as a supplier.

On November 22, 1994, the circuit court entered its opinion on the cross-motions, granting summary disposition to Grand River on Counts I and III and to IFIC on Counts II and IV. The court

determined that Grand River was a materialman, not a subcontractor, that Grand River's notice was tardy, and that Grand River failed to properly perfect its claim against IFIC. On February 27, 1995, the court entered an order in accordance with its opinion and certified the order as a final order under MCR 2.604(A).

On appeal, Grand River argues that the circuit court erred when it failed to recognize an ambiguity in the bond that existed because the terms "subcontractor" and "supplier" were not defined in the contract and that the court also erred when it did not construe the bond's ambiguity strictly against its drafter, IFIC. We disagree.

We review summary disposition motions under MCR 2.116(C)(10) de novo to verify that the prevailing party was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). A summary disposition motion under subrule (C)(10) tests a claim's factual support and permits a matter to be resolved on questions of law so long as the facts are not in dispute. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A genuine issue of material fact exists when a disputed fact is dispositive of the legal issue in a case. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1991). Giving the nonmoving party the benefit of all reasonable doubt, the court must determine whether a record might be developed on the factual issue over which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

The IFIC's bond promises to pay the State of Michigan or "any persons, firm or corporation who may furnish labor, material, supplies for equipment, for camp or construction, and equipment on a rental basis, on account of and actually used in the performance of the contract" unless Schaaf Builders made the payments. The IFIC bond allowed subcontractors, who did not furnish notice of reliance within the sixty-day period provided for in MCL 570.102; MSA 26.322, to furnish that notice within sixty days after MDOT's notice of the final estimate's payment or notice of the post-final estimate. The IFIC bond also required suppliers to provide notice within 120 days after the last date that materials were furnished to the contractor or the subcontractor. The bond does not define the terms "subcontractor" or "supplier."

An insurance contract is ambiguous if, after reading the entire contract, its language can reasonably be understood in differing ways. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991). Ambiguities are to be construed against the insurer as the contract's drafter. See *M & H Tool Co, Inc v Aetna Casualty & Surety Co*, 185 Mich App 571, 574; 463 NW2d 124 (1990). An insurance policy's terms are given their commonly used meaning unless clearly defined in the policy, and omitting the definition of a word that has a common usage does not create an ambiguity. *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). A court may consider extrinsic facts, such as the parties' relations and the type of property insured, when deciding whether an ambiguity exists. *Jones v Farm Bureau Mutual Ins Co*, 172 Mich App 24, 27; 431 NW2d 242 (1988).

Grand River's argument that IFIC's bond is ambiguous because it does not define "subcontractor" or "supplier" fails if those terms have commonly used meanings. *Group Ins, supra*. The circuit court noted that IFIC's bond refers to the public works act and that the public works act does not define "subcontractor." See MCL 570.101 *et seq.*; MSA 26.321 *et seq.* The court then turned to case law decided under an earlier, but substantially similar, version of the public works act that defined a "subcontractor" as follows:

The subcontractor is an under contractor, -- one who takes under the original contract, and is to perform in accordance with the original contract. [*People, for the Use of Westover-Kamm Co v Valley Mantel & Tile Co*, 200 Mich 554, 557; 166 NW 839 (1918) (quoting *Avery v Bd of Supervisors of Ionia Co*, 71 Mich 538, 547; 39 NW 742 (1888) (emphasis deleted).]

We note that the circuit court correctly looked to case law decided under the public works act for a definition of the term "subcontractor," see *Jones, supra*, that this definition has been relied upon since 1888, and that the definition has become the commonly used meaning that is well-understood in reference to the public works act, *Group Ins, supra*. Consequently, the IFIC bond is not ambiguous merely because it did not include a definition of the term "subcontractor." *Bianchi, supra*.

Grand River further argues that the circuit court erred when it granted IFIC summary disposition. We disagree. The circuit court noted that the parties had stipulated that Grand River was neither submitted to nor approved by MDOT's project engineer as a subcontractor as required by the 1990 specifications.¹ Moreover, Grand River did not comply with the MDOT/Schaaf Builders contract's subcontracting requirements and expressly disavowed liability for breaches of those requirements. In *Westover-Kamm, supra*, our Supreme Court, considering similar circumstances, determined that "it conclusively appears that none of these claimants contracted to become a subcontractor." None of the claimants were approved by the architect as required by the contract and, accordingly, "it does not appear that they did agree to take under the original contract and perform in accordance with its terms." *Id.* at 558. Considering the stipulation of the parties and the uncontested facts in this case, the trial court properly applied *Westover-Kamm* in granting summary disposition in favor of IFIC.²

We affirm.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman

¹ Grand River argues that there was a genuine issue of material fact concerning whether IFIC's bond actually incorporates by reference the MDOT/Schaaf Builders contract, and, by extension, the 1990 specifications, which defined "subcontractor." However, even if the MDOT/Schaaf Builders contract was not incorporated by reference into the IFIC bond, the circuit court could properly review the 1990

specifications' subcontractor definition. The court may consider surrounding facts, such as related contract documents in interpreting the IFIC bond. *Jones, supra*.

² Grand River points out the 1990 specifications' provision "that the Department's pre-qualification of a Subcontractor and approval of a subcontract is for the benefit of the Department and is not for the benefit of the Contractor or any other person" As further language shows, MDOT clearly wanted to prevent approval of a subcontractor from inuring to the benefit of a contractor who might argue that it would not "remain[] fully responsible...for completion of the work" done by a subcontractor once approval had been given. Similarly, MDOT did not intend to provide "a guarantee or warranty" regarding the subcontractor to the benefit of some third party. We find all of this inapposite to the question at hand, whether Grand River took under the 1990 specifications with their pre-approval and related requirements. Plaintiff has provided us no authority upon which we might find the language relied upon relevant to this question. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).