

STATE OF MICHIGAN
COURT OF APPEALS

ROSATI MASONRY CO., INC.,

Plaintiff-Counterdefendant-Appellant,

v

JONNA CONSTRUCTION COMPANY,

Defendant-Counterplaintiff-Appellee.

UNPUBLISHED

March 3, 1998

No. 198336

Oakland Circuit Court

LC No. 94-485812-CK

Before: McDonald, P.J., and Jansen and Smolenski, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition and denying its motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff also challenges the trial court's order granting defendant's motion for attorney fees and an order denying its motion for reconsideration. We affirm.

Defendant was the general contractor assigned to perform the construction work for a new Home Depot store in Warren, Michigan. Defendant entered into a subcontract agreement with plaintiff whereby plaintiff was to provide masonry labor and materials for the construction of the building. On October 20, 1993, plaintiff completed construction of the final wall located on the east side of the building. The following morning, a 47 mile an hour wind struck the wall, causing it to collapse.

Thereafter, plaintiff submitted a bid to defendant for reconstruction of the wall, which defendant accepted. The wall was rebuilt according to the specifications; however, defendant refused to compensate plaintiff the \$20,632 it allegedly agreed to pay. The parties do not dispute that defendant paid plaintiff the original amount under the contract.

Plaintiff first argues the trial court erred in denying its motion for summary disposition and in holding that the alleged oral agreement between the parties, under which plaintiff was to reconstruct the wall and defendant was to pay plaintiff an agreed upon sum, was unenforceable for lack of consideration. Specifically, plaintiff challenges the trial court's finding that because plaintiff had a pre-existing duty under the original contract to rebuild the wall, a promise to render the same service was inadequate consideration to support a subsequent agreement. Plaintiff additionally attacks the trial

court's finding that it bore the entire risk of loss for any damage incurred to the building prior to completion of the project except when defendant's sole negligence was the cause of the damage.

This Court reviews a trial court's decision to grant or deny a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). In reviewing a motion for summary disposition, this Court must decide all legitimate inferences and reasonable doubts in favor of the non-moving party, to determine whether the moving party is entitled to judgment as a matter of law. *Moll v Abbott Laboratories*, 444 Mich 1, 27 n 36; 506 NW2d 816 (1993); *Roberson v Occupational Health Ctrs*, 220 Mich App 322, 324; 559 NW2d 86 (1996).

In Michigan, the essential elements of a valid contract are: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). It is a fundamental principle of contract law that a promise to pay is not a binding or enforceable promise if it is not supported by consideration. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The performance of a pre-existing duty or legal obligation is generally held not to be sufficient consideration for a return promise. The pre-existing duty rule "is that a promise to do that which the promisor is legally bound to do, or the performance of an existing legal obligation, does not constitute consideration, or sufficient consideration, for a contract." *In re Easterbrook Estate*, 114 Mich App 739, 748; 319 NW2d 655 (1982); *Green v Millman Brothers, Inc*, 7 Mich App 450, 455; 151 NW2d 860 (1967). There is also a pre-existing duty rule based on a statutory duty to perform some obligation. Where one promises to undertake an obligation that he already had a statutory duty to perform, the promise is not supported by adequate consideration. *General Aviation, Inc v Capital Region Airport Authority (On Remand)*, 224 Mich App 710, 715; 569 NW2d 883 (1997), lv pending; *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 525; 529 NW2d 318 (1995).

Generally, it is improper for a trial court to grant a motion for summary disposition on the basis of lack of consideration alone because whether there was valid consideration to support the contract is a factual question for the trier of fact. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992). However, this Court has held that where a party has a statutory duty to provide a service or perform an activity, a subsequent agreement by which the party promises to do the same is unenforceable for lack of consideration as a matter of law; therefore, summary disposition is proper under such circumstances. *Pawlak v Redox Corp*, 182 Mich App 758, 765-766; 453 NW2d 304 (1990); *Guilbault v Dep't of Mental Health*, 160 Mich App 781, 784-785; 408 NW2d 558 (1987). We believe that the same logic applies to cases where a pre-existing contractual duty exists.

In the instant case, the parties' original agreement contains the following provision:

21. INDEMNITY AND RESPONSIBILITY

Subcontractor shall protect, indemnify and hold JCC harmless from any and all liability, expense, including attorney fees, claims, demands and suits for injury including death, of any person or damage to property arising out of or occurring in connection with the

performance of this contract, except if such damages or injuries are caused by the sole negligence of JCC.

We find that although the provision does not itemize all situations for which plaintiff would be liable, the broad language employed by the parties in the contract, evidenced by the terms “any and all,” established that the risk of loss for property damage fell upon plaintiff. The fact that the parties did not limit liability or specify who would bear the risk of loss under circumstances where the damage was caused by acts of God or natural disasters, suggests that the risk of loss would still fall upon plaintiff unless stated otherwise. Accordingly, because plaintiff had a pre-existing duty to rebuild the wall, any subsequent agreement with defendant to reconstruct the wall was unenforceable for lack of consideration. Thus, the court’s order denying summary disposition for plaintiff was proper.

Next, plaintiff argues the trial court erred in granting defendant’s motion for summary disposition on its counterclaim when it found that the indemnity provision in the subcontract obligated plaintiff to reconstruct the wall but that defendant was not obligated to compensate plaintiff for the additional work.

Michigan courts recognize three possible sources of a right to indemnification: common law, an implied contract, and an express contract. *Paul v Bogle*, 193 Mich App 479, 490; 484 NW2d 728 (1992). Indemnity contracts should be construed to ascertain and give effect to the true intentions of the parties. *MSI Construction Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). In ascertaining the intentions of the parties, the language used in the contract is considered, as well as the situation of the parties and circumstances surrounding the contract. *Id.* An indemnity provision should be interpreted to give a reasonable meaning to all its provisions. *Id.* However, indemnity clauses are construed most strictly against the party who is the indemnitee. *Id.* at 344.

Again, we find that the broad all-inclusive language of the indemnity clause is a strong indicator that the parties intended to protect defendant against the type of liability plaintiff attempts to impose. The use of the term “all” in an indemnity clause has been interpreted to provide for the broadest possible indemnification. *Triple E Produce Corp v Mastronardi Produce, Inc*, 209 Mich App 165, 173; 530 NW2d 772 (1995). In addition, the circumstances surrounding the making of the contract and the purposes sought to be accomplished are also indicators of the parties’ intentions that the risk of loss was to fall upon plaintiff until completion of the project as long as defendant was not solely at fault for the damages.

Plaintiff contends it would not have challenged the court’s decision if the collapse of the wall had been caused by its own negligence or defective construction. Because plaintiff built the wall in accordance with industry standards and in the same manner as it did the other walls that survived the storm, plaintiff contends the collapse was caused solely by the high winds, which were out of plaintiff’s control.

However, the language in the indemnification provision indicates that plaintiff’s negligence is not the only basis for which plaintiff could be held responsible for damages incurred prior to completion of the project. To the contrary, the contract contemplates that plaintiff will be held liable for “any and all”

damages that occur prior to completion unless defendant is solely negligent. Thus, although the indemnification provision does not explicitly place the risk of loss on plaintiff for damages arising from acts of God, we find that the broad, inclusive manner in which the clause was drafted, imposes liability on plaintiff for “any and all” damages, including those occurring from acts of God. Indeed, had the parties intended to exclude natural disasters, or other acts of God, from the instances in which plaintiff bore the risk of loss, they would have done so in the same manner in which they relieved plaintiff of liability for defendant’s sole negligence. Therefore, we conclude that plaintiff was obligated to rebuild the wall upon destruction according to the indemnification provision, and defendant was not required to pay plaintiff beyond the original contract price. Accordingly, summary disposition in favor of defendant was proper.

Finally, plaintiff argues that the trial court erred in awarding defendant attorney fees pursuant to the indemnification provision when the claim was based on the oral reconstruction contract which does not provide for payment of attorney fees. The decision whether to award attorney fees is within the sound discretion of the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). This Court reviews that decision for an abuse of discretion. *Id.*

Attorney fees are not recoverable unless expressly allowed by statute, court rule, or judicial exception. *Popma v Auto Club Ins Ass’n*, 446 Mich 460, 474; 521 NW2d 831 (1994). However, contractual provisions for the payment of reasonable attorney fees are enforceable. *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317, 326; 395 NW2d 31 (1986). Thus, parties to a contract may include a provision that under certain circumstances one party will be required to pay the other side’s reasonable attorney fees. *Zeeland Farm v JBL Enterprises*, 219 Mich App 190, 195-196; 555 NW2d 733 (1996). The party seeking attorney fees has the burden of proof as to reasonableness. *Id.* at 196.

In the instant case, plaintiff’s primary argument on appeal is that the trial court abused its discretion in awarding defendant all of its attorney fees pursuant to the indemnity provision in the original contract when plaintiff’s claim was based on a subsequent oral agreement that did not contain an indemnity clause or a provision for payment of attorney fees as damages. Thus, although plaintiff does not deny that defendant is entitled to some attorney fees, it claims that the recovery should be limited to that authorized by the offer of judgment rule under MCR 2.405(D), whereby defendant would be entitled to recover reasonable attorney fees incurred in defending this action after plaintiff rejected defendant’s offer of judgment.

Because we have already concluded that the alleged oral reconstruction agreement was unenforceable for lack of consideration, it had no effect or value to this dispute. Thus, the only agreement governing the rights and duties of the parties was the written contract, which contained a valid indemnity provision. Therefore, the trial court was obligated to enforce the clear and unambiguous terms of that agreement, and it did not abuse its discretion in permitting defendant to recover reasonable attorney fees from plaintiff.

Plaintiff also suggests that even if the indemnity provision in the original contract was applicable, the trial court still abused its discretion because a plain reading of that clause does not authorize an

award for attorney fees as damages in a breach of contract action. Plaintiff contends that the indemnification provision only protected defendant from tort claims resulting in personal injury or property damage. Plaintiff's argument is without merit. There is no language in the contract suggesting that the scope of the indemnity provision is limited to tort claims. Nor do we find that such an interpretation was contemplated by the parties at the time the contract was entered into. The clause specifically states that defendant shall be held harmless from "any and all liability, expense, including attorney fees, claims, demands and suits for injury, including death, of any person or damage to property" There is no language excluding contractual disputes, and we are not persuaded that the parties intended to limit the coverage of the clause to tort actions. Therefore, the trial court did not abuse its discretion in awarding defendant attorney fees pursuant to the indemnification clause.

Affirmed.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

/s/ Michael R. Smolenski