

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARCELLI CONSTRUCTION COMPANY,

Plaintiff/Counterdefendant-  
Appellant,

and

OHIO FARMERS INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

v

CITY OF LAPEER,

Defendant/Counterplaintiff/Cross-  
Plaintiff-Appellee,

and

TMP ASSOCIATES, INC.,

Defendant/Cross-Defendant-  
Appellee.

UNPUBLISHED

March 23, 2006

No. 258314

Lapeer Circuit Court

LC No. 00-028823-CK

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Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

This case is one of several resulting from a protracted legal battle waged in several counties between intervening plaintiff Ohio Farmers Insurance Company (OFIC), a construction surety company, and plaintiff Marcelli Construction Company (Marcelli), a contractor whose performance OFIC bonded for a number of projects. Here, Marcelli appeals as of right from an order to enforce an agreement that OFIC reached with codefendants Lapeer and its architectural firm, TMP Associates, Inc., without Marcelli's participation, to settle a lawsuit Marcelli brought against the two defendants and in which OFIC, as Marcelli's surety, was permitted to intervene. We affirm.

The first of the parties' suits to reach this Court was OFIC's action against Marcelli to recover the amounts it had paid to complete the various projects. The project at issue in this appeal, a community center Marcelli built for Lapeer, was one of the projects addressed by the trial court in that earlier case. The trial court opinion in that case explains the dispute:

This action was brought by Plaintiff [OFIC] to recover under an indemnification agreement. . . . Plaintiff provided payment and performance bonds to MCCI [Marcelli] on 10 separate municipal construction projects. As part of securing the bonds, MCCI entered into an indemnification agreement . . . .

Plaintiff filed suit alleging that Defendants have defaulted on the obligations on most of the ten projects and that Plaintiff met Defendants' obligations pursuant to the bond agreement. Plaintiff alleges that demand for indemnification under the agreement was made to Defendants and refused. . . .

. . . Under the Agreement, Plaintiff is entitled to be indemnified in the amount of any reserve set by the surety as well as the amount paid out less the amount received from the owners of the projects for a total of \$6,648,522. Plaintiff notes that the Indemnity Agreement provides that Plaintiff can recover for any and all disbursements made by it in good faith belief that it was liable for the sums or that it was necessary to disburse funds whether or not liability existed pursuant to the bond agreement. The Indemnification Agreement states that evidence of the payment is prima facie evidence of the fact and amount of liability.

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Plaintiff submits . . . that Defendants were notified upon Plaintiff's receipt of bond claims against them and Defendants have received notification of every payment made by Plaintiff. Defendants were defaulted and terminated from 5 projects with a base contract value of \$17,000,000.00 and have registered objections to the payment of less than \$100,000.00 of the claims. Plaintiff has submitted the formal default letters filed by the owners in 5 of the project and has attached proof of payments made via a ledger.

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. . . Defendants explain that the problems began when Eastern Michigan University withheld payment to Defendants alleging liquidated damages for delay. Defendants disputed the claim and ultimately Plaintiff determined that it was a wrongful assessment. However, during the dispute Defendants requested that Plaintiff assist in facilitating a settlement between Defendants and EMU. At that point, Plaintiff intervened in all ten of the projects for which it had supplied Defendants<sup>[1]</sup> bonds.

According to Defendants, Plaintiff sent demand letters advising project owners not to pay further monies to Defendants. When all payments to Defendants stopped it became impossible for Defendants to complete the

projects<sub>[,]</sub> forcing a declaration of default of some of the project owners. Indeed<sub>[,]</sub> 5 of the projects had been completed a year or more prior to the February 5, 1996 date of the demand letters. In addition, Defendants point out that Lapeer Community Center Project was substantially completed and Defendants were owed \$350,000.00 when the demand letter was sent by Plaintiff. Plaintiff later sent a letter asking the project owner to declare a default and the owner did so.

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Defendants further argues that Plaintiff is trying to have it both ways by claiming that it believed in good faith that liability existed requiring Defendants to indemnify while at the same time suing the project owners for their breaches of the underlying construction contracts with Defendants.

Plaintiff replies that pursuant to the bond agreements, once Defendant failed to pay its obligations Plaintiff was required to pay on claims which were filed. Once Plaintiff paid the obligations, the Indemnity Agreement becomes operative and Plaintiff is legally entitled to pursue, on its own behalf, any claim which Defendants may have had against the project owners. Plaintiff submits that it becomes legally entitled to the project proceeds at the moment it begins paying claims on a given project.

This Court affirmed the judgment of the Oakland Circuit Court holding Marcelli and its owners, Tony and Cynthia Marcelli, jointly and severally liable to OFIC for \$6,648,552 because of Marcelli's defaults on ten projects for which OFIC was the surety. *Ohio Farmers Ins Co v Marcelli Construction Co, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2001 (Docket No. 221502). We also rejected Marcelli's claim that the trial court wrongly denied Marcelli's motion for leave to bring a counterclaim for bad faith against OFIC. *Ohio Farmers, supra*, slip op at 2.<sup>1</sup>

After Marcelli filed suit in Oakland Circuit Court,<sup>2</sup> OFIC intervened and moved for summary disposition against Marcelli. After transfer of this action to the Lapeer Circuit Court, the trial court arranged for facilitative mediation to promote a settlement. Those efforts were successful, and in 2004, OFIC, Lapeer, and TMP—without Marcelli's participation—reached a proposed negotiated settlement, which they asked the court to enter. After a hearing was held on Marcelli's objections, the court ruled that the settlement would enter as the final judgment in the case.

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<sup>1</sup> We also upheld the trial court's subsequent denial of Marcelli's motion to set aside the judgment. *Marcelli Construction Co v Ohio Farmers Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 2005 (Dkt. No. 254230)

<sup>2</sup> Marcelli originally filed against fifteen defendants, not including OFIC, in a single suit in Oakland County. The suits were separated and this suit was transferred to Lapeer Circuit Court.

Marcelli argues that the lower court erred in entering the negotiated settlement over Marcelli's objections. We disagree. Claims that require interpretation of an indemnity agreement are reviewed de novo. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). The fact of Marcelli's default and OFIC's rights under the indemnity agreement, which included the Lapeer project, were decided in the prior appeal. We concluded in that prior appeal that "[o]nce defendants [Marcelli] failed to pay subcontractors and material suppliers, and plaintiff [OFIC] was required to pay under the bond, the indemnity agreement allowed plaintiff to obtain any contract proceeds owed to defendants by the owners of the projects." *Ohio Farmers, supra*, slip op at 2. Further, the indemnity agreement plainly states that Marcelli gave OFIC full authority to settle *all* claims arising from the bonded project, and that Marcelli ratified those decisions in advance. Thus, OFIC had the contractual right to settle claims arising from the construction project for which OFIC was a surety, including the right to settle claims Marcelli made against any project owners after a default.

We also disagree with Marcelli's argument that we should reverse the trial court because there never was a finding of default on the Lapeer project. To the contrary, evidence in the form of the August 30, 1995 correspondence from TMP to Lapeer, and the June 19, 1996 correspondence from Lapeer to Marcelli, establish that the owner, on the recommendation of the architect, asserted that Marcelli had defaulted under the contract. Although these letters do not establish as a matter of law that Marcelli defaulted on the project, that is not required under the agreement. Instead, the contract provides that "in the event of any breach or default *asserted* by the obligee" OFIC can take over any remaining project and afterward demand payment from Marcelli. There was no dispute in this case, nor in the prior Oakland Circuit case, that this occurred.

Finally, we reject Marcelli's argument that OFIC cannot take a position in this litigation contrary to positions taken in other litigation. Collateral estoppel does not bar OFIC from pursuing its claims for consequential and other damages. Indeed, it is not necessarily inconsistent for OFIC to allow Marcelli to pursue (or to threaten to pursue) claims against one defendant while reaching negotiated settlements with others that preclude any further actions against them.

Affirmed.

/s/ Bill Schuette  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio