

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

KENT COUNTY, MICHIGAN; and
AFFILIATED FM INSURANCE
COMPANY,

Plaintiffs,

vs.

G2, INC.; and OWEN-AMES-KIMBALL
COMPANY,

Defendants.

Case No. 15-01195-CZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING IN PART, AND DENYING IN
PART, DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

By mid-afternoon on February 10, 2012, almost everybody in downtown Grand Rapids knew that a crane had landed on the Kent County Correctional Facility (“Kent County Jail”). Based upon that occurrence, Plaintiff Kent County and its insurance provider, Plaintiff Affiliated FM Insurance Company (“Affiliated FM”), filed this action against the general contractor, Defendant Owen-Ames-Kimball Company (“OAK”), and a sub-subcontractor for the crane, Defendant G2, Inc. (“G2”). At the outset, both defendants have moved for summary disposition under MCR 2.116(C)(7) and (10). The Court shall provide some, but not all, of the relief the defendants seek.

I. Factual Background

Summary disposition under MCR 2.116(C)(7) “is appropriate because of release” or various other defenses separate from the merits of a claim. Although a moving party “may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence[,]”

Maiden v Rozwood, 461 Mich 109, 119 (1999), “a movant under MCR 2.116(C)(7) is not required to file supportive material” with a summary-disposition motion. Id. “The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” Id. “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” Id. at 120. “In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion.” Id. Therefore, the Court shall limn the facts underlying this dispute by considering all of the evidence presented by the parties.

In 2010, Plaintiff Kent County enlisted Defendant OAK to take the lead in constructing an addition to the Kent County Jail. The parties signed a prime contract, see Complaint, Exhibit A (AIA Document A134-2009, Standard Form of Agreement Between Owner and Construction Manager as Constructor), and agreed to general conditions governing that construction contract. See Complaint, Exhibit A (AIA Document A201-2007, General Conditions of the Contract for Construction (“Work Contract”)). Defendant G2 participated as a sub-subcontractor “to supply and operate cranes during the Project.”¹ See Complaint, ¶ 11. On February 10, 2012, “G2 was operating a Sumitomo SC1500 tower crane to lift steel girders into place” for the Kent County Jail addition “when the Crane toppled and fell, resulting in extensive damage” to two separate buildings. See Complaint, ¶ 12.

On February 9, 2015, Plaintiff Kent County and its insurer, Plaintiff Affiliated FM, filed suit against Defendants OAK and G2, setting forth claims for negligence, gross negligence, and private nuisance against G2 and claims for negligence, gross negligence, breach of contract, and breach of

¹ Plaintiff OAK contracted with Kerkstra Precast, Inc., see Brief in Support of Defendants OAK and G2's Motion for Summary Disposition, Exhibit B, which, in turn, entered into a contract with Defendant G2. See id., Exhibit C.

warranties against OAK. The complaint also sought indemnification from OAK under the parties' contract. Both defendants promptly sought summary disposition under MCR 2.116(C)(7) and (10), presenting a passel of arguments aimed at ending the lawsuit. On September 16, 2015, in the wake of oral argument on the motion for summary disposition, the parties stipulated to dismissal without prejudice of the claim for gross negligence against OAK. But all of the other claims remain at issue, so the Court must consider the viability of each remaining claim.

II. Legal Analysis

The defendants have moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). “If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.” RDM Holdings, Ltd v Continental Plastics, Inc, 281 Mich App 678, 687 (2008). “If a factual dispute exists, however, summary disposition is not appropriate.” Id. Similarly, “[s]ummary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact.” West v General Motors Corp, 469 Mich 177, 183 (2003). Such “[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” Id. Applying these standards, the Court shall consider each claim asserted by the plaintiffs.

A. Negligence Against Both Defendants – Counts One and Three.

First and foremost, the plaintiffs contend the defendants’ ordinary negligence resulted in the crane falling on the Kent County Jail. “A common-law negligence claim requires proof of (1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages.” Romain v Frankenmuth Mutual Ins Co, 483 Mich 18, 21-22 (2009). But both defendants insist that

the contractual agreements among the parties obviate the need to consider the elements of negligence because the contractual language expressly released Defendants OAK and G2 from potential liability for all damages covered by Plaintiff Kent County's insurance.

As an initial matter, Plaintiff Kent County and Defendant OAK have a contractual agreement that restricts their ability to sue each other. Specifically, the parties' contract states, in pertinent part, as follows:

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees . . . for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work. . . A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

See Complaint, Exhibit A (Work Contract, § 11.3.7 – “Waivers of Subrogation”). In simple terms, this language bars the owner, *i.e.*, Kent County, and the contractor, *i.e.*, OAK, from pursuing a claim for damages if the loss was “covered by property insurance” for the project. Here, most of the loss suffered by Kent County was covered by its own insurer, *i.e.*, Plaintiff Affiliated FM, and so Kent County cannot seek recovery from any contractor, subcontractor, or sub-subcontractor for its insured loss.

Nor can Plaintiff Kent County's insurer, Plaintiff Affiliated FM, recover for the insured loss from a contractor, subcontractor, or sub-subcontractor under a theory of subrogation. As a subrogee, Affiliated FM merely “stands in the shoes of the subrogor and acquires no greater rights than those possessed by the subrogor.” Yerkovich v AAA, 461 Mich 732, 737 (2000). Kent County waived its right to seek recovery of any “loss covered by property insurance” on the project, so that waiver

likewise binds Kent County's subrogee. Accordingly, under the terms of the contract, Affiliated FM can give no static at all to either general contractor Defendant OAK or sub-subcontractor G2 for the insured loss caused by the falling crane.²

But Plaintiff Kent County contends that it suffered uninsured loss as well as insured loss from the falling crane. That is, Kent County incurred damages (such as deductibles) for loss arising from the Kent County Jail addition and the adjacent Fleet Services Building, which were damaged by the falling crane. See Complaint, ¶¶ 28, 44. Because Kent County suffered property damage for which it received no insurance coverage, the contract does not bar the county from seeking recovery for its uninsured loss from Defendants OAK and G2. Moreover, OAK bears as much responsibility as G2 for G2's negligence because the parties' contract makes OAK "responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors." See Complaint, Exhibit A (Work Contract, § 3.3.2). The Court, therefore, must deny summary disposition to the defendants with respect to Kent County's negligence claim seeking recovery for the loss that was not covered by insurance. Although that loss may be relatively small, Kent County has the legal right to seek recompense for that loss in its entirety.

² Although this ruling forecloses Plaintiff Affiliated FM from pursuing its negligence claim against the defendants for damage to the Kent County Jail addition, the Court cannot yet sweep away Affiliated FM's negligence claim for the damage caused by the crane to the adjacent Fleet Services Building. Affiliated FM insists that, even though it furnished coverage to Plaintiff Kent County for that loss, it may seek recovery despite the waiver-of-subrogation provision because the Fleet Services Building did not fall within the scope of the project described by the parties' contract. See Plaintiffs' Response to Defendant G2, Inc. and Owen-Ames-Kimball Co.'s Motion for Summary Disposition, Exhibit 2 (Affidavit of Francine Farrington, ¶ 5). In contrast, the defendants assert that the Fleet Services Building was a crucial part of the project. See Reply Brief in Support of Defendant OAK and G2's Motion for Summary Disposition, Exhibit F (Affidavit of Kurt Oosting, P.E., ¶¶ 10-11). The Court must err on the side of caution and permit discovery to proceed before granting summary disposition as to Affiliated FM's negligence claim for damage to the Fleet Services Building. See Liparoto Construction, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34 (2009).

B. Gross Negligence Against G2 – Count One.

Although Plaintiff Affiliated FM has stipulated to dismiss its gross-negligence claim against Defendant OAK, Affiliated FM has continued to press its gross-negligence claim against Defendant G2. As a result, the Court must consider whether the record contains sufficient evidence to support such a claim. The existence of gross negligence matters a great deal because, under Michigan law, a contractual waiver of liability such as the provision in the parties' contract here "serves to insulate against ordinary negligence, but not gross negligence." Xu v Gay, 257 Mich App 263, 269 (2003). Thus, if Affiliated FM can prove that the crane fell because of G2's gross negligence, then Affiliated FM (in its capacity as Kent County's subrogee) can recover the insured loss from G2 in spite of the language in the contract that bars recovery of insured loss.

Under Michigan law, gross negligence contemplates "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Xu, 257 Mich App at 269. G2 insists that its actions in providing an inexperienced crane operator, who made some mistakes in operating the crane on February 10, 2012, cannot be characterized as gross negligence. The Court has serious doubts that Plaintiff Affiliated FM can prove that the crane operator was so inexperienced and inept that his assignment to the Kent County Jail project and the mistakes he made on the job constituted gross negligence. Nevertheless, Affiliated FM has presented an affidavit that describes G2's actions as "dramatically below the industry standard of care for crane operators and owners." See Plaintiffs' Response to Defendant G2, Inc. and Owen-Ames-Kimball Co.'s Motion for Summary Disposition, Exhibit 4 (Affidavit of Ronald M Kohner, P.E., ¶ 12(1)). The affidavit also states that G2's "actions demonstrate a level of recklessness akin to a complete lack of concern for the health and safety of persons and property on the job site during the Project." See id. Thus, Affiliated FM has presented enough evidence of gross negligence to survive G2's summary-disposition motion on that claim.

C. Private Nuisance Against G2 – Count Two.

Although the parties have devoted scant attention to the plaintiffs' private-nuisance claim in Count Two of their complaint, the Court can readily resolve that claim at this early stage of the case. The theory of private nuisance "evolved as a doctrine to resolve conflicts between neighboring uses of land[.]" Adkins v Thomas Solvent Co, 440 Mich 293, 303 (1992), not to enable a landowner to recover damages from a contractor who caused physical damage while working on the land with the owner's permission. In one formulation, a private-nuisance claim requires proof that the "defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use[.]" See id. at 304. Nothing of the sort is present here. Moreover, under the traditional analysis, "nuisance arose when occupants of neighboring lands had a dispute, typically over the proper use of the defendant's land." See id. at 307. In this case, Defendant G2 had no land adjacent to Plaintiff Kent County's property; G2 was working on Kent County's land because of a contractual obligation to assist in improving the Kent County Jail. Finally, "nuisance normally require[s] some degree of permanence." Id. at 308. If the "asserted interference" is "temporary and evanescent," there can be "no actionable nuisance." Id. Here, G2's operation of the crane on Kent County's property was, by contract and in fact, temporary. Therefore, the Court must award summary disposition to G2 on the private-nuisance claim, which is patently unsustainable.

D. Breach of Contract Against OAK – Count Four

In Count Four, Plaintiffs Kent County and Affiliated FM both contend that Defendant OAK breached its contractual duties to "furnish efficient construction administration, management services and supervision[.]" to "perform the Work in an expeditious and economical manner consistent with the Owner's interests," and to "at all times observe and comply with all federal, state and local laws,

ordinances, rules, and regulations that may in any manner affect the safety or equipment or material used in accordance with” the parties’ contract. See Complaint, ¶¶ 47-48. That contract, however, also contains language that precludes the plaintiffs from seeking recovery for losses covered by Kent County’s property insurance. See Complaint, Exhibit A (Work Contract, § 11.3.7 – “Waivers of Subrogation”). Thus, the Court must award summary disposition to OAK insofar as the breach-of-contract claim seeks recovery of any insured loss, but the Court must deny summary disposition with respect to Kent County’s effort to recover its uninsured loss on a breach-of-contract theory. As a result, Affiliated FM cannot proceed on Count Four,³ but Kent County can proceed on that claim in its own right to recover only its own losses.

E. Breach of Warranty Against OAK – Count Five.

Count Five, advanced by Plaintiffs Kent County and Affiliated FM, accuses Defendant OAK of breaching both express and implied warranties in its capacity as general contractor. “In order to determine whether any express warranties were made, it is generally necessary to examine the terms of the parties’ contract.” See Heritage Resources, Inc v Caterpillar Fin Services Corp, 284 Mich App 617, 636 (2009). The parties’ contract includes a warranty, which provides that OAK “warrants that the Work will conform to the requirements of the Contract documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit.” See Complaint, Exhibit A (Work Contract, § 3.5 – “Warranty”). That warranty – coupled with the facts developed thus far – provides ample support for the plaintiffs’ breach-of-warranty claim at this early stage of the case.

³ For the reasons explained in footnote 2, *supra*, the Court shall allow Plaintiff Affiliated FM to seek recovery for the damage to the Fleet Services Building, but its ability to prevail on that claim depends, in the first instance, upon proof that the Fleet Services Building was not part of the project on which Defendant OAK provided services as a general contractor.

Once again, however, Plaintiff Affiliated FM's claim founders upon the subrogation waiver in the parties' contract that bars the plaintiffs from seeking recovery for any losses covered by Kent County's property insurance. See Complaint, Exhibit A (Work Contract, § 11.3.7 – "Waivers of Subrogation"). Thus, the Court must grant summary disposition to Defendant OAK with respect to Affiliated FM's breach-of-warranty claim,⁴ but the Court shall permit Plaintiff Kent County to go forward on its breach-of-warranty claim in an effort to recover its uninsured losses.

F. Indemnification Against OAK – Count Six.

In Count Six of the complaint, Plaintiff Kent County asserts a right to indemnification from Defendant OAK under the terms of the parties' contract, which states:

[T]he Contractor shall indemnify and hold harmless the Owner . . . from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to . . . destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

See Complaint, Exhibit A (Work Contract, § 3.18 – "Indemnification"). As our Supreme Court has recently explained, an "indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation." See Miller-Davis Co v Ahrens Construction, Inc, 495 Mich 161, 173 (2014). Indemnity clauses are quite common in the construction industry, see id., and "Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses." Id.

⁴ For the reasons explained in footnote 2, *supra*, the Court shall allow Plaintiff Affiliated FM to seek recovery for the damage to the Fleet Services Building, but its ability to prevail on that claim depends, in the first instance, upon proof that the Fleet Services Building was not part of the project on which Defendant OAK provided services as a general contractor.

Here, the indemnification clause in the parties' contract plainly requires Defendant OAK to indemnify Plaintiff Kent County "from and against . . . losses . . . resulting from performance of the Work" if the loss "is attributable to . . . destruction of tangible property (other than the Work itself)." See Complaint, Exhibit A (Work Contract, § 3.18—"Indemnification"). This indemnification clause most naturally applies in situations where the property owner, *i.e.*, Kent County, has to pay money for a loss and then must turn to OAK for indemnification. Here, although Kent County simply had to pay deductibles to its insurer and perhaps other expenses to cover the damage caused by the crane, the language of the indemnification clause can accommodate Kent County's demand for recovery from OAK for Kent County's out-of-pocket expenses resulting from the crane incident. Thus, the Court must deny OAK's request for summary disposition on Count Six. In fact, the Court would be inclined to grant summary disposition to Kent County on that claim under MCR 2.116(I)(2) if the parties had more comprehensively briefed that matter. For now, the Court shall simply permit Kent County to proceed on its indemnification claim. In the fullness of time, however, the Court almost certainly will render a ruling in favor of Kent County on that claim.

III. Conclusion

For all of the reasons set forth in this opinion, the Court must award summary disposition to Defendants OAK and G2 with respect to Plaintiff Affiliated FM's claims in Counts One and Three for ordinary negligence, except that the Court shall allow Affiliated FM to proceed on its negligence claim with respect to the damage to the Fleet Services Building. In similar fashion, the Court shall grant summary disposition to OAK on the breach-of-contract and breach-of-warranty claims stated by Affiliated FM in Counts Four and Five except insofar as Affiliated FM is requesting damages for the Fleet Services Building. Also, the Court shall award summary disposition to G2 on the private-

nuisance claim in Count Two *in toto* because that claim cannot be sustained. In all other respects, the Court shall permit the case to go forward. Thus, Plaintiff Kent County may pursue recovery for its own losses under all of the theories set forth in Counts One, Three, Four, Five, and Six. Beyond that, Plaintiff Affiliated FM may press its claims for gross negligence in Counts One and Three and its demands in Counts One, Three, Four, and Five for compensation for the loss it has to pay for the damage to the Fleet Services Building.

IT IS SO ORDERED.

Dated: November 25, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge