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

SUMMIT BUILDING SERVICES, LLC,

Plaintiff,

vs.

KIRIO'S ROOFING AND PAINTING, INC.,

Defendant/Third-Party Plaintiff,

vs.

SCHAEDLER ENTERPRISES, INC.,

Third-Party Defendant.
_____/

Case No. 19-08015-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER RESOLVING MOTIONS FOR
SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

On July 5, 2017, a crane operator working for Third-Party Defendant Schaedler Enterprises, Inc. ("Schaedler") directed by signals from workers for Defendant Kirio's Roofing and Painting, Inc. ("Kirio's") lowered a bunk of oriented strand board at a construction site in Ohio. The bunk struck a roof truss, causing additional braced roof trusses to fail, which in turn caused another bunk to fall through four units below. Nobody was hurt, but the damage at the construction site was substantial. Initially, all three parties and others litigated in the Court of Common Pleas in Wood County, Ohio. Subsequently, Plaintiff Summit Building Services, LLC ("Summit") filed this action for breach of contract and contractual indemnification, so the entire dispute came crashing into the Michigan court system. In response to a cascade of motions, the Court shall award summary disposition under MCR 2.116(C)(10) in full to Summit as to liability on its claims and in part to Schaedler.

I. Factual Background

Plaintiff Summit and Third-Party Defendant Schaedler have moved for summary disposition under MCR 2.116(C)(10), and Defendant Kirio's has responded to those two motions by requesting an identical form of relief under MCR 2.116(I)(2). Such requests challenge the factual sufficiency of the claims. El-Khalil v Oakwood Healthcare, Inc, 504 Mich 152, 160 (2019). In resolving those requests, the Court "must consider all evidence submitted by the parties[.]" Id. Accordingly, the Court shall present the factual background of this dispute by discussing all of the evidence in the record. Additionally, Kirio's has asked for relief for spoliation of evidence purportedly committed by Summit, so the Court shall wrap its discussion of that request into its analysis of the demands for summary disposition.

The basic facts leading to this litigation seem simple to understand. As part of a construction project in Perrysburg, Ohio, Plaintiff Summit entered into a subcontract with Defendant Kirio's for roof-framing work. That subcontract obligated Summit to provide a tractor and crane if necessary, and Summit subsequently enlisted Third-Party Defendant Schaedler to furnish a crane at the job site. On July 5, 2017, a crane operator from Schaedler was performing a blind lift of a heavy bunk, so the crane operator received signals from Kirio's workers to complete that task. The bunk struck a truss, which led to the failure of other trusses, which caused a separate bunk to fall four stories, damaging the construction project on its way to the ground. The involvement of each party also is obvious. Summit hired Schaedler, which brought the crane that lifted the bunk as Kirio's workers signaled to the crane operator from Schaedler. Of course, each party has placed blame for the accident on one or both of the other parties. The Court's responsibility at this stage involves making decisions about whether any party can prevail in whole or in part on summary disposition.

Plaintiff Summit's first amended complaint against Defendant Kirio's presents two claims: (1) breach of the parties' subcontract; and (2) contractual indemnification. Kirio's, in turn, has made three third-party claims against Third-Party Defendant Schaedler for (1) equitable subrogation, (2) common-law indemnification, and (3) contribution. Every single claim and third-party claim is now the subject to competing requests for summary disposition. Beyond that, Kirio's insists that Summit has forfeited its right to seek recovery because of spoliation of evidence. Specifically, Kirio's argues that Summit failed to preserve – and, in fact, authorized the destruction of – the damaged trusses, thereby rendering Kirio's unable to evaluate the cause of the accident. The Court shall address each of the numerous issues raised by the parties.

II. Legal Analysis

The motions for summary disposition filed by Plaintiff Summit and Third-Party Defendant Schaedler under MCR 2.116(C)(10) must be granted if "there is no genuine issue of material fact." El-Khalil, 504 Mich at 160. Similarly, the Court should award summary disposition pursuant to MCR 2.116(I)(2) to Defendant Kirio's "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment" under that standard. A "genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." Id. Therefore, with respect to each claim and third-party claim, the Court must assess whether a genuine issue of material fact remains. Additionally, Kirio's contends that Summit engaged in spoliation of evidence so severe that Summit's claims should be dismissed as a sanction. The Court shall address that motion as part of its analysis of the competing requests for summary disposition made by Summit and Kirio's.

A. Summit's Claim for Breach of Contract.

To support its breach-of-contract claim in Count One of its first amended complaint, Plaintiff Summit must establish three elements: "(1) there was a contract, (2) the other party breached the contract, and (3) the breach resulted in damages to the party claiming breach." Bank of America, NA v First American Title Ins Co, 499 Mich 74, 100 (2016). Summit and Defendant Kirio's agree that they entered into a subcontract for framing that imposed duties and indemnification obligations upon Kirio's. See First Amended Complaint, Exhibit A. Count One sets forth sweeping allegations that Kirio's breached its performance obligations at the time of the accident and breached its defense and indemnification obligations after the accident. The record establishes that no Summit employee was involved in the accident at the job site,[1] but Summit enlisted Schaedler to provide the crane and the crane operator that played a major role in the accident. Moreover, Summit engaged Schaedler to fulfill its obligation under its subcontract with Kirio's to "provide a tractor and crane if needed." See id. (Sub Contractor Agreement at 1 – "Scope of Work"); see also Brief in Support of Plaintiff Summit's Motion for Summary Disposition, Exhibit 4. Thus, Kirio's insists that Summit bears legal responsibility for the actions of the crane operator, Tom Snyder, who worked for Schaedler, even though no Summit employee had anything to do with the accident.

As a general rule, "a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." DeShambo v Anderson, 471 Mich 27, 31 (2004). Accordingly, the Court must presume at the outset that negligence on the part of Schaedler's crane operator cannot be imputed to Plaintiff Summit even though Summit hired Schaedler to work at the job site. But the

[1] The only Summit employee on site at the time of the accident was site superintendent Dave Sollars, who was in a trailer when the accident occurred. Nothing in the record even suggests that Sollars had any involvement in the events on the date of the accident.

law in Michigan recognizes an exception to the general rule in the form of "the 'inherently dangerous activity' doctrine[,]" id., which Defendant Kirio's has invoked in an attempt to bind Summit to the negligence of the crane operator employed by Schaedler. Under the "inherently dangerous activity" doctrine articulated by our Supreme Court, "the landowner must itself owe some duty to the specific third party, . . . the negligent act that causes the injury cannot be collateral to the work contracted for, and . . . the injury that occurs must be reasonably expected by the landowner." Id. at 34. More to the point, the danger contemplated must be "danger to *third parties* and not to those involved in the dangerous activity." Id. (emphasis in original). For several reasons, the Court believes that Kirio's cannot avail itself of the "inherently dangerous activity" doctrine to pin blame for the negligence of the Schaedler crane operator upon Summit. The damage resulting from the accident was done to the property owner in the form of damage to the work in progress at the job site, not to some uninvolved third party. See id. at 38-39. Beyond that, Summit was not a landowner upon whom responsibility for an inherently dangerous activity may ultimately rest under Michigan law. See id. at 38. Summit was merely a subcontractor that enlisted the assistance of other subcontractors to complete its work. In such a scenario, where the Court must assign fault for damages among various subcontractors on a construction project, application of the "inherently dangerous activity" doctrine makes little sense because each subcontractor that feels inadequate to perform a specific task should be encouraged to enlist another subcontractor with expertise in performing that specific task.

Because the Court concludes that Defendant Kirio's cannot invoke the "inherently dangerous activity" doctrine to impose upon Plaintiff Summit a non-delegable duty to safely perform the crane work, Summit must prevail on its motion for summary disposition against Kirio's on Count One of the first amended complaint under the principle "that a person who hires an independent contractor

is not liable for injuries that the contractor negligently causes." DeShambo, 471 Mich at 31. Thus, the Court shall award summary disposition under MCR 2.116(C)(10) to Summit as to liability on Count One, which alleges that Kirio's breached the parties' subcontract. Accordingly, Summit must still prove its damages for breach of contract, but the issue of liability for breach of the subcontract no longer can be treated as a contested matter.

B. Summit's Claim for Contractual Indemnification.

In Count Two of its first amended complaint, Plaintiff Summit alleges that Defendant Kirio's breached its obligation under the parties' subcontract to furnish indemnification to Summit. "An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation." Miller-Davis Co v Ahrens Construction, Inc, 495 Mich 161, 173 (2014). The Court's "task in construing a contract for indemnification is to give effect to the parties' intention at the time they entered into the contract." Id. at 174. To do that, the Court must "assess the threshold question whether a contract's indemnity clause applies to a set of facts by a 'straightforward analysis of the facts and the contract terms.'" See id. "The only legal restriction upon indemnity in the subcontractor context is the prohibition on indemnification against the 'sole negligence' of the contractor[.]" Id. at 173. With these principles in mind, the Court shall turn to Summit's demand for contractual indemnification from Kirio's.

Unsurprisingly, the language of the indemnification clause in the parties' subcontract bears a striking similarity to most other indemnification clauses in the construction industry. Indeed, as our Supreme Court has observed, "[i]n the construction context, indemnity clauses between general contractors (indemnitees) and subcontractors (indemnitors) are common, with general contractors

and subcontractors ultimately liable to the project owner." Miller-Davis, 495 Mich at 173. In this case, the indemnity clause to which Summit and Kirio's agreed states as follows:

INDEMNITY

> To the fullest extent permitted by law, Subcontractor [*i.e.*, Kirio's] shall indemnify, defend (at Subcontractor's expense) and hold harmless Contractor [*i.e.*, Summit], its successors and assigns from and against any and all claims for bodily injury, death or damage to property, demands, damages, actions, causes of action, suites [sic], losses, judgements [sic], obligations and any liabilities, costs and expenses including but not limited to investigative and repair costs, attorneys' fees and costs, and consultants' fee [sic] and costs ("Claims") which arise or are in any way connected with the materials furnished, or Services provided under this Agreement by Subcontractor or its agents. These indemnity and defense obligations shall further apply to any acts or omissions, negligent or willful misconduct of Subcontractor, its employees or agents, whether active or passive. The indemnity and defense obligations shall further apply, whether or not the claims arise out of the concurrent act, omission or negligence of the indemnified Parties, whether active or passive. Subcontractor shall not be required to indemnify or defend Contractor for claims found to be due to the sole negligence or willful misconduct of the Contractor.

See First Amended Complaint, Exhibit A (Sub Contractor Agreement at 4-5 – "Indemnity"). That "language used by the parties in contracting for indemnity is unambiguous, and clearly intended to apply as broadly as possible." Miller-Davis, 495 Mich at 175.

Defendant Kirio's insists that Plaintiff Summit is foreclosed from seeking indemnification because the accident at the job site was due to the sole negligence of Summit. See Miller-Davis, 495 Mich at 173. But that argument rests upon the flawed premise that Summit is legally responsible for the negligence of Schaedler merely because Summit enlisted Schaeder to provide the crane and the crane operator involved in the accident. The Court has already explained why that theory fails, so the Court readily concludes that the accident did not result from the sole negligence of Summit. Even assuming, *arguendo*, that Summit should be held to account for Schaedler's negligence, there is ample evidence that Kirio's employees gave faulty and confusing signals to the crane operator, so

even the negligence of Schaedler itself was not the sole cause of the accident. Finally, the language of the indemnity provision in the subcontract between Summit and Kirio's easily accommodates the demand for indemnification made by Summit in Count Two. After all, Summit was sued in the Ohio court system by its own insurer, so Summit faced an actual legal claim that it had to defend. Thus, under even the most crabbed construction of the indemnity clause, Kirio's must indemnify Summit because Summit was called to account for the accident at the construction site. See DaimlerChrysler Corp v G-Tech Professional Staffing, Inc, 260 Mich App 183, 186-187 (2003). Finally, any doubt about the obligation of Kirio's to indemnify Summit falls away in the face of an unpublished ruling of our Court of Appeals on facts virtually identical to this case in Baker Concrete Construction, Inc v Whaley Steel Corp, No 272350 (Mich App Dec 2, 2008) (unpublished decision). Consequently, the Court shall grant summary disposition under MCR 2.116(C)(10) to Summit and against Kirio's on Count Two of Summit's first amended complaint. All that remains to be done with that claim, therefore, is a determination of the damages to which Summit is entitled.

C. The Kirio's Theory of Spoliation by Summit.

As its final gasp, Defendant Kirio's implores the Court to dismiss Plaintiff Summit's claims as a sanction for spoliation of evidence. That is, Kirio's accuses Summit of permitting destruction of the trusses that gave way during the accident. Under Michigan law, a request for dismissal based upon spoliation cannot be presented in a motion for summary disposition. See Bloemendaal v Town & Country Sports, Inc, 255 Mich App 207, 211 (2003). Instead, a proper "response to the problem of evidence spoliation frames the alleged wrong as an evidentiary concept," Teel v Meredith, 284 Mich App 660, 664 (2009), for which the harshest sanction is dismissal under the "inherent powers

to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." Bloemendaal, 255 Mich App at 211. Dismissal, however, "'is a drastic step that should be taken cautiously.'" Id. at 214. "Before imposing the sanction of dismissal, the trial court must carefully evaluate all available options" and then "conclude that dismissal is just and proper." Id. Here, the Court concludes that dismissal of Summit's claims as a sanction for allowing the trusses to be destroyed is not just and proper.

The claims made by Plaintiff Summit against Defendant Kirio's sound in contract, rather than tort, so the tort system for allocating fault for the accident plays no significant role in the analysis of Summit's claims. The preservation of evidence like the damaged trusses, therefore, has a bearing upon the Court's analysis only insofar as the Court must determine whether the accident was caused by the "sole negligence" of Summit. See Miller-Davis, 495 Mich at 173. But because Summit had no direct involvement in the accident and the Court has ruled that Schaedler's negligence cannot be assigned to Summit, the examination of the damaged trusses could not possibly provide Kirio's with a defense to Summit's claims for breach of the subcontract. Therefore, it would make no sense for the Court to dismiss those claims for breach of contract that Kirio's could not challenge based upon the condition of the damaged trusses. To be sure, Summit still must prove its damages for breach of the subcontract, so the Court will entertain a request by Kirio's for a sanction short of dismissal if Kirio's can convince the Court that Summit was responsible for spoliation of evidence that might have hindered the defense. Indeed, Michigan law directs the Court to consider all available options if spoliation has occurred. See Bloemendaal, 255 Mich App at 214. In the context of this litigation, however, the "drastic step" of dismissal far exceeds the gravity of any spoliation that occurred and makes no sense given the nature and strength of Summit's claims for breach of contract. See id.

D. The Kirio's Third-Party Claim for Equitable Subrogation.

The real fight in this case must take place between Kirio's and the business that furnished the crane and the crane operator, *i.e.*, Third-Party Defendant Schaedler.[2] Without question, Kirio's and Schaedler were the two companies that provided the equipment and the workers involved in the accident on July 5, 2017. That explains why, after Plaintiff Summit commenced this action, Kirio's filed a third-party complaint against Schaedler. The first count of that third-party complaint seeks relief from Schaedler on a theory of equitable subrogration. As Kirio's put it: "If Kirio's is required to pay any sums to Summit pursuant to the Kirio's subcontract that were due to the negligence of [Schaedler], then Kirio's would be the equitable subrogee of Summit's rights against [Schaedler]." See Third-Party Complaint, ¶ 17.

Our Supreme Court has described equitable subrogation as "'a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.'" Auto-Owners Ins Co v Amoco Production Co, 468 Mich 53, 59 (2003). "[T]he subrogee acquires no greater rights than those possessed by the subrogor,'" id., so Kirio's characterizes its role as paying off the obligation for the accident owed to Summit and then pursuing recovery from Schaedler as the party "'primarily responsible'" for Summit's damages. See id. Because "'[e]quitable subrogation is a flexible, elastic doctrine of equity[,]'" Eller v Metro Industrial Contracting, Inc, 261 Mich App 569, 573 (2004), "[i]ts application is to be determined on a case-by-case basis." Id. "'[T]he mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability.'" Id. at 574.

---

[2] All of the parties appear to agree that there was no contract between Third-Party Defendant Schaedler and Plaintiff Summit, nor was there a contract between Schaedler and Third-Party Plaintiff Kirio's.

Third-Party Defendant Schaedler's request for summary disposition on the claim of equitable subrogration rests upon the assertion that the record contains no evidence of Schaedler's negligence. But the Court finds ample evidence of Schaedler's negligence in conducting the blind lift of the bunk of oriented strand board that struck a roof truss and touched off the accident resulting in damage to the construction project. The Court also rejects the assertion by Defendant Kirio's that "Schaedler is 100% at fault for the accident occurring." To put it plainly, a genuine issue of material fact exists as to the relative responsibility of Schaedler and Kirio's for the accident. Schaedler's crane operator lowered the bunk in a manner that set the accident in motion, and Kirio's provided the workers who gave seemingly faulty signals to the crane operator during the blind lift. Accordingly, the Court must deny summary disposition to Schaedler under MCR 2.116(C)(10) and to Kirio's pursuant to MCR 2.116(I)(2) on the equitable subrogation claim in Count One of the third-party complaint.

E. The Kirio's Third-Party Claim for Common-Law Indemnification.

Count Two of the third-party complaint sets forth a claim by Defendant Kirio's against Third-Party Defendant Schaedler for common-law indemnification. In Michigan, "'[t]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses.'" Botsford Continuing Care Corp v Intelistaf Healthcare, Inc, 292 Mich App 51, 62 (2011). "The right 'exists independently of statute,'" id., "'and whether or not contractual relations exist between the parties,'" id., "'and whether or not the negligent person owed the other a special or particular legal duty not to be negligent.'" Id. But because common-law indemnification "'is intended only to make whole again a party held vicariously liable to another through no fault of his own[.]'" id., "a common-law

indemnification action 'cannot lie where the plaintiff was even .01 percent actively at fault.'" Id. at 63. This extraordinarily stringent requirement is fatal to the common-law indemnification claim that Kirio's has pleaded in Count Two of its third-party complaint against Schaedler.

The Court's inquiry must begin with a review of Plaintiff Summit's first amended complaint because "[i]f the primary plaintiff's complaint contained any allegations of active negligence, rather than merely allegations of passive negligence, common-law indemnification is not available." See Botsford, 292 Mich App at 63. Although Summit's first amended complaint sets forth breach-of-contract claims against Defendant Kirio's, that pleading accuses Kirio's of active negligence as that term is explained and employed in Botsford. See First Amended Complaint, ¶¶ 10, 12, 29(a) & (b), 39. Moreover, the Court's independent review of the evidence presented by the parties leads to the ineluctable conclusion that Kirio's was at least ".01 percent actively at fault" for the accident based upon the faulty and confusing signals its workers gave to the crane operator. See Botsford, 292 Mich App at 63. As a result, "a common-law indemnification action 'cannot lie[,]'" see id., so the Court shall award summary disposition under MCR 2.116(C)(10) to Schaedler and against Kirio's on the claim for common-law indemnification in Count Two of the third-party complaint.

F. The Kirio's Third-Party Claim for Contribution.

The final claim advanced by Defendant Kirio's in its third-party complaint seeks relief from Third-Party Defendant Schaedler on a theory of contribution. A Michigan statute provides a right of contribution "when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property[,]" see MCL 600.2925a(1), but any liability imposed upon Kirio's would be based upon a breach of its subcontract with Plaintiff Summit, as opposed to a tort claim. Therefore,

the contribution statute affords Kirio's no succor even if it alone must pay damages to Summit. Our Supreme Court, however, has strongly suggested that the traditional theory of contribution applies well beyond tort claims covered by the contribution statute. See Tkachik v Mandeville, 487 Mich 38, 47 (2010). Our Supreme Court noted that "[t]his Court has applied the doctrine of contribution between co-contractors." Id., citing Comstock v Potter, 191 Mich 629, 637 (1916). Additionally, our Supreme Court has "recognized the right of equitable contribution for tenants in common" based "'upon purely equitable considerations,' explaining that '[i]t is premised upon the simple proposition that equality is equity.'" Tkachik, 487 Mich at 47. Accordingly, Kirio's may pursue its third-party claim against Schaedler for contribution even though any damages for which Kirio's is held liable will necessarily arise from contract claims, as opposed to tort claims.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall award summary disposition to Plaintiff Summit and against Defendant Kirio's under MCR 2.116(C)(10) with respect liability (but not damages) on both of Summit's claims for breach of the parties' subcontract. Additionally, the Court shall grant summary disposition under MCR 2.116(C)(10) to Third-Party Defendant Schaedler and against Kirio's on Count Two of the third-party complaint. In all other respects, the competing requests for summary disposition under MCR 2.116(C)(10) and MCR 2.116(I)(2) are denied.

IT IS SO ORDERED.

Dated: November 12, 2021

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