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STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN INSURANCE COMPANY,

Plaintiff-Appellee,

v

GRAND RAPIDS FIRE PROTECTION, INC.,

Defendant-Appellant.

UNPUBLISHED
December 17, 2020

No. 350785
Ottawa Circuit Court
LC No. 17-005167-NZ

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial to grant summary disposition in its favor pursuant to MCR 2.116(C)(7) and (C)(10). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

In its opinion and order denying defendants' motion for summary disposition, the trial court summarized the background of this matter as follows:

> Plaintiff Michigan Insurance Company (Michigan Insurance) is the property insurance carrier for GL Rentals, Inc. (GL). GL is the owner of a two-story commercial building. GL's business premises are located on the first floor of the building; the second floor consists of apartments. Nonparty T2 Construction (T2) was the general contractor that built the building. Grand Rapids Fire is a subcontractor that was employed by T2 to install a fire suppression system in the building. The building sustained extensive water damage when a valve connecting the water main and the fire suppression system failed, resulting in a flood of the first floor of the building. GL's owner and employees noticed water pouring into the floor and contacted T2. An agent of T2 examined the failed valve, photographed the valve, contacted Grand Rapids Fire, and asked the firm to come to [sic] building and repair the fire suppression system as rapidly as possible. Michigan Insurance paid for the damages and became subrogated to GL's rights.

Following denial of defendants' motion for summary disposition, the matter proceeded to trial where the jury found in favor of the plaintiff.[1] This appeal ensued.

II. ANALYSIS

On appeal, defendant argues that the trial court incorrectly interpreted the waiver-of-rights clause found in the GL Rentals-T2 contract when the trial court decided that GL Rentals did not waive plaintiff's right to bring a subrogation claim. This incorrect interpretation of the contract led the trial court to mistakenly find that plaintiff, as GL Rental's insurer, had a right of subrogation against defendant. Plaintiff argues on appeal that the trial court did not err in its interpretation of the waiver-of-rights clause when it determined that the waiver-of-rights clause did not apply to defendant; therefore, plaintiff was able to maintain its subrogation action against defendant to recover for water damage.

"[T]he interpretation of a contract is a question of law reviewed de novo on appeal . . . ." *Lueck v Lueck*, 328 Mich App 399, 404; 937 NW2d 729 (2019) (quotation marks and citation omitted; alterations in original). "An unambiguous contract must be enforced according to its terms." *Id*. (quotation marks and citation omitted). "But interpretation of an ambiguous contract is a question of fact that must be decided by a jury." *Shaw v Ecorse*, 283 Mich App 1, 22; 770 NW2d 31 (2009). "A contract is ambiguous if the words may reasonably be understood in different ways or the provisions irreconcilably conflict with each other." *Id*. "Whether a contract is ambiguous is a question of law, while determining the meaning of ambiguous contract language becomes a question of fact." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019).

The Waiver of Rights clause in question reads:

> Waiver of Rights. Owner [GL Rentals] and Contractor [T2] hereby waive all rights each might have against the other for damages caused at or in connection with the Project by fire or other perils to the extent covered by insurance, except such rights as they may have to the proceeds of such insurance. Contractor shall require, by appropriate agreement, written where legally required for validity, similar waivers in favor of itself and Owner by subcontractors and sub-subcontractors. With respect to the waiver of rights of recovery, the term "Owner" shall be deemed to include, to the extent by property insurance applicable thereto, its consultants, employees and agents.
>
> All policies of insurance maintained by Owner and Contractor with respect to the Project shall contain provisions whereby the insurer waives its right of subrogation with respect to losses payable under such policies.

[1] The issue before the jury was whether defendant negligently installed the flange adapter, or whether there was a phenomenon known as a "water hammer" that caused the disconnection of the flange adapter.

Our primary obligation "when interpreting a contract is to determine the intent of the parties. The parties' intent is discerned from the contractual language as a whole according to its plain and ordinary meaning." *Id*. (citation omitted). We must give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "A court may not rewrite clear and unambiguous language under the guise of interpretation." *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010). An unambiguous contract must be enforced as written, see *Lueck* 328 Mich App at 404, while the trier of fact must decide the meaning of an ambiguous contract, see *Shaw*, 283 Mich App at 22. "It is well settled that the scope of a release is governed by the intent of the parties as expressed in the release." *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000). Moreover, "it is not contrary to this state's public policy for a party to contract against liability for damages caused by ordinary negligence." *Paterek v 6600 Ltd*, 186 Mich App 445, 448; 465 NW2d 342 (1990).

Here, the trial court held that the language in the waiver-of-rights clause did not create a waiver of subrogation to be applied as between GL Rentals and defendant. Instead, the trial court held that the "language protects GL [Rentals] and T2 from claims by subcontractors, but does not preclude claims *against* subcontractors." The trial court's assertion was correct, see *Bodnar*, 327 Mich App at 220. However, on appeal, defendant faults the trial court for relying on certain language during its analysis, all the while refusing to admit that defendant's appeal is premised on reading only portions of the agreement.

According to the clear language of the contract, GL Rentals and T2 agreed to "waive all rights each might have *against the other* for damages caused at or in connection with the Project." Accordingly, this portion of the waiver applied solely to GL Rentals and T2. Next, the clause states that T2 "shall require, by appropriate agreement, written where legally required for validity, similar waivers in favor of itself and [GL Rentals] by subcontractors and sub-subcontractors." From this language, GL Rentals and T2 agreed to have similar waivers of rights *in favor of themselves*. Similar to the trial court's findings, GL Rentals and T2 waived their rights as to one another and agreed to have any subcontractors waive its rights against GL Rentals and T2. It did not, however, waive GL Rentals's or T2's rights against any subcontractors. The waiver-of-rights clause serves to protect GL Rentals and T2 from each other as well as subcontractors, but contrary to the assertions of defendant, the clear language of the waiver-of-rights clause did not serve to protect the subcontractors from claims by GL Rentals or T2.

The terms "similar waivers" operate as a phrase to relate back to the beginning of the waiver-of-rights clause to demonstrate what was waived, i.e., claims for damages "caused at or in connection with the Project by fire or other perils to the extent covered by insurance." As agreed upon by GL Rentals and T2, T2 agreed to obtain similar waivers from the subcontractors in favor of itself and GL Rentals. Contrary to defendant's position, it did not create a waiver of subrogation to be applied to all subcontractors. Rather, the parties agreed to have their rights waived as against each other. In addition, the parties to the contract also agreed that any subcontractors that T2 obtained for construction would waive their rights against GL Rentals and T2. However, the agreement did not create a waiver of rights by GL Rentals and T2 against the subcontractors.

The trial court's analysis gave due regard to the parties' intent, and just because the trial court did not "stress" the language "similar waivers" in its opinion does not mean that the trial

court did not interpret the clause as a whole. The trial court's outcome demonstrates that it analyzed the language "similar waivers" to mean that T2 required the same type of waivers from the subcontractors that it and GL Rentals agreed upon. Contrary to defendant's position that "similar waivers" is the crucial language, the analysis cannot stop at "similar waivers." The next critical part of the clause states "in favor of," which demonstrates that T2 required the same type of waivers from subcontractors that it and GL Rentals agreed upon but only to be applied *against* subcontractors, not *for* subcontractors. In other words, T2 required that the subcontractors waive their rights against GL Rentals and T2, but it did not require GL Rentals and T2 to waive their rights against the subcontractors. Simply stated, GL Rentals and T2 assured each other that they would not bring a claim against one another, but there "is no reason to conclude that [GL Rental] . . . was acting to protect parties other than itself in receiving this promise. See, *Brunsell v Zeeland*, 467 Mich 293, 299; 651 NW2d 388 (2002).

Defendant's reliance on unpublished opinions issued by this Court are also unpersuasive.[2] In each case, a panel of this Court determined that there was a waiver of subrogation included in the contract that precluded an insurer from bringing suit. However, in each case defendant relies on, there was clear and manifest language that the parties to the contract were waiving their rights as against each other *and* subsequent parties that were brought into the project. In this case, no such language exists. Because we conclude that the clause in question did not create a waiver of subrogation by plaintiff's subrogor, we need not address defendant's remaining arguments that the trial court erred when it limited the application of the waiver to the period of construction or whether defendant was a third-party beneficiary because both issues are moot.

Affirmed. Plaintiff having prevailed may tax costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[2] We are not bound by unpublished opinions, see MCR 7.215(C)(1), nor do we find the cases cited by defendant to be persuasive to its argument, see *Eddington v Torrez*, 311 Mich App 198, 203; 874 NW2d 394 (2015).