

No. 1-17-2524

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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|--|---|---------------------|
| LAUREN HUSSAR, JACK BAGINSKI, and |) | Appeal from the |
| BERTHA OCAMPO, |) | Circuit Court of |
| |) | Cook County |
| Plaintiffs, |) | |
| |) | |
| v. |) | Nos. 13 L 08768 and |
| |) | 13 L 13812 (cons.) |
| |) | |
| THE BREWSTER CONDOMINIUM |) | |
| CORPORATION; THE BREWSTER |) | |
| CONDOMINIUM ASSOCIATION; ADVANCED |) | |
| CONSULTING GROUP, INC.; FIRST PROPERTIES, |) | |
| LLC; and THORNTON TOMASETTI, INC., |) | |
| |) | |
| Defendants, |) | |
| |) | |
| (The Brewster Condominium Association, |) | Honorable |
| Counterdefendant-Appellee; Thornton Tomasetti, Inc., |) | John H. Ehrlich, |
| Counterplaintiff-Appellant). |) | Judge, Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the circuit court’s order which granted The Brewster Condominium Association’s (Brewster Association’s) motion for partial summary judgment as

to Count I of Thornton Tomasetti, Inc.'s (Tomasetti's) counterclaim seeking indemnification from Brewster Association for Tomasetti's own negligence and reverse the order which denied Tomasetti's motion to reconsider the grant of partial summary judgment.

¶ 2 The counterplaintiff, Thornton Tomasetti, Inc. (Tomasetti), appeals from orders of the circuit court of Cook County which granted "partial summary judgment" in favor of the counterdefendant, The Brewster Condominium Association (Brewster Association) as to Count I of its amended counterclaim which sought indemnity pursuant to a contractual agreement and denied Tomasetti's Motion to Reconsider the order granting "partial summary judgment." For the reasons which follow, we reverse and remand.

¶ 3 The following facts are taken from the pleadings, affidavits, and the contractual agreement that Brewster Association and Tomasetti submitted and which were relied upon by the circuit court in granting "partial summary judgment."

¶ 4 Brewster Association is the condominium association for the eight-story real property located at 2800 North Pine Grove Avenue, Chicago, Illinois. On April 28, 2011, Brewster Association and Tomasetti entered into a contractual agreement (Agreement) in which Tomasetti agreed to perform an at-a-distance inspection of the façade of Brewster Association's condominium building as well as prepare a report of its inspection (in conformity with the City of Chicago Building Code) in exchange for a \$2500 fee for services. The Agreement included the "Standard Conditions for Investigation and/or Design Services" (Standard Conditions) and was drafted, created, and used by Tomasetti. Paragraph 2 of the Agreement provides:

"To the fullest extent permitted by law, the Client [Brewster Association] shall hold harmless, defend and indemnify TT [Tomasetti] and its consultants, and each of their owners, directors, employees, heirs, successors and assigns from any and all claims, suits, demands, damages, losses, judgments, payments, awards and

expenses arising out of the Client's [Brewster Association's] negligence on this project; Contractor(s)' negligence in performing the work and/or supplying the materials; or the negligence of any other party relative to the project except that, subject to paragraph 8, TT [Tomasetti] shall be liable for all claims, damages, losses, judgments and expenses due to the sole negligence of TT [Tomasetti], its owners, directors, employees and consultants."

Paragraph 8 of the Agreement provides:

"It is expressly understood and agreed that, to the fullest extent permitted by law, TT's [Tomasetti's] liability arising from any claims, suits, demands, damages, losses, judgments, payments, awards, and expenses relating to the project shall be limited to and in no event exceed the lesser of 1) three times the basic fee received by TT [Tomasetti] for services rendered on the project or 2) TT's [Tomasetti's] available insurance proceeds."

¶ 5 On August 2, 2013, Lauren Hussar and Jack Baginski filed a complaint against the defendants, the Brewster Condominium Corporation (Brewster Corp.) and Brewster Association, later adding Advanced Consulting Group, Inc. (Advanced) and First Properties, LLC (First Properties), which is Brewster Association's property manager, alleging that on or about July 31, 2013, a water tank, situated on the roof of Brewster Association's building, collapsed and fell into an alleyway adjacent to the building, causing personal injuries to both plaintiffs. Hussar and Baginski alleged that the defendants' negligence was the proximate cause of their injuries (case number 13 L 8768).

¶ 6 Bertha Ocampo commenced suit against Brewster Corp. and Brewster Association on December 5, 2013, in case number 13 L 13812, also alleging that, on or about July 31, 2013, a

water tank, situated on the roof of Brewster Association's building, collapsed and fell into an alleyway adjacent to the building, causing her personal injuries. Ocampo alleged that the defendants' negligence was the proximate cause of her injuries.

¶ 7 On June 9, 2014, case number 13 L 8768 and case number 13 L 13812 were consolidated and Hussar, Baginski, and Ocampo (hereinafter referred to collectively as the "original plaintiffs") filed their twelve-count second amended complaint, adding Tomasetti as a defendant and alleging that the negligence of each of the defendants was the proximate cause of their injuries.

¶ 8 On July 18, 2014, and November 26, 2014, Tomasetti sent written correspondence to Brewster Association, tendering its defense of the claims alleged against it in the second amended complaint and demanding indemnity for the claims alleged therein. There is no evidence in the record that Brewster Association responded.

¶ 9 On May 20, 2015, Tomasetti filed its counterclaim against Brewster Association seeking indemnity and contribution for the claims alleged against it in the second amended complaint. On May 21, 2015, First Properties filed a one-count counterclaim for contribution against Tomasetti. Advanced filed a two-count counterclaim for contribution against First Properties and Tomasetti on September 4, 2015. On October 27, 2015, Tomasetti sent written correspondence to Brewster Association, tendering its defense of the claims alleged against it in the counterclaims for contribution filed by First Properties and Advanced and demanding indemnity for the claims alleged therein. There is no evidence in the record that Brewster Association responded.

¶ 10 On December 3, 2015, Tomasetti filed a two-count amended counterclaim against Brewster Association. Count I alleged that Brewster Association breached the Agreement by failing to indemnify Tomasetti against claims arising out of the negligence of Brewster

Association, any contractor, and any other party, which included Tomasetti, unless Tomasetti was solely negligent. Tomasetti alleged that Brewster Association “failed and continues to fail to defend and indemnify Thornton Tomasetti” after it sent three letters tendering its defense of the claims alleged against it in both the second amended complaint and counterclaims and demanding indemnity for the claims alleged therein. In Count II, Tomasetti sought contribution from Brewster Association in the event that the original plaintiffs were able to recover from it any part of their alleged damages.

¶ 11 On April 12, 2016, Brewster Association filed a motion seeking summary judgment, which it styled as a motion for “partial summary judgment,” on Count I of Tomasetti’s two-count amended counterclaim. Brewster Association argued that the language of the Agreement, which required it to indemnify Tomasetti, does not entitle Tomasetti to indemnity for its “own negligence.” Tomasetti argued that the plain language of the Agreement required Brewster Association to indemnify it for (1) Brewster Association’s negligence; (2) the negligence of any contractor hired by Brewster Association; or (3) the negligence of any other party relative to the project. Tomasetti further argued that “any other party relative to the project” included itself and that the only exception in the Agreement is that it shall be liable for its “sole negligence.”

¶ 12 On June 24, 2016, the circuit court delivered its ruling from the bench, and entered an order that same day, granting the motion for “partial summary judgment.” A transcript of the proceedings was filed and made a part of the common law record. During the hearing, the circuit court found that paragraph 2 of the Agreement was “very plain and unambiguous” and that Brewster Association’s obligation to indemnify Tomasetti for claims arising out of the negligence of “any other party” did not include Tomasetti’s own negligence. The court stated that it would include a specific provision in its order stating that “it’s understood that Thornton

Tomasetti would be able to bring a post-trial motion for indemnification based upon a finding of fault.” Thereafter, the circuit court entered a written order which provided, in pertinent part:

“The Brewster Condominium Association’s motion for partial summary judgment is granted. The Brewster Condominium Association shall file a copy of the transcript with the court to make it part of the record. The court’s ruling is without prejudice to Thornton Tomasetti’s right to bring a post-trial motion for indemnity under the parameters stated by the court in its ruling.”

¶ 13 On February 10, 2017, Advanced entered into a settlement with the original plaintiffs and was dismissed from the consolidated action.

¶ 14 On April 7, 2017, all of the remaining claims of all of the remaining parties were dismissed with prejudice, pursuant to an Agreed Dismissal Order, with the exception of Count I of Tomasetti’s amended counterclaim against Brewster Association.

¶ 15 The preamble and the operative terms of the April 7, 2017 Agreed Dismissal Order provided:

“THIS MATTER HAVING COME before this Court for pretrial settlement conference, and the parties having reached an agreement between themselves for settlement on all counts of the complaints and on all counterclaims by and among the defendants, with the exception of Count I of Thornton Tomasetti’s amended counterclaim against the Brewster Condominium Association [Brewster], which Count I is the subject of the order dated June 24, 2016, and as to such Count I, no settlement has been reached and Thornton Tomasetti reserves its right to continue to prosecute the claim asserted in such Count:

IT IS HEREBY ORDERED: that all Plaintiffs' claims against all Defendants are dismissed with prejudice;

IT IS FURTHER ORDERED: that all counterclaims for contribution by and between all Defendants are dismissed with prejudice;

IT IS FURTHER ORDERED: that Count I of Thornton Tomasetti's Amended Counterclaim is unaffected by the settlement and dismissal of claims in this Order;

IT IS FURTHER ORDERED: that this case is dismissed in accordance with the settlement, with all parties to pay their own costs. The Court retains jurisdiction for enforcement of said settlement and adjudication of any liens; and

IT IS FURTHER ORDERED: that this order is a final order. The Case Management Conference date of April 18, 2017 before Judge Ehrlich in Room 2009 is stricken. The trial date of April 19, 2017 is stricken.”

¶ 16 On May 8, 2017, Tomasetti filed a motion to reconsider the order granting “partial summary judgment,” entitled “735 ILCS 5/2-1203 Motion to Reconsider and Modify Order Granting Partial Summary Judgment and for Other Relief.” In its motion to reconsider, Tomasetti sought modification of the June 24, 2016 order requesting that the court: vacate the partial summary judgment entered against it; require Brewster Association to indemnify it for amounts paid in settlement of the original plaintiffs' claims; and order Brewster Association to reimburse it for expenses incurred in defending against the original plaintiffs' claims and for expenses incurred to enforce the Agreement.

¶ 17 On September 15, 2017, the circuit court ruled on Tomasetti's motion to reconsider and entered an order denying the motion. Tomasetti filed its notice of appeal on October 13, 2017,

seeking review of: (1) the September 15, 2017 order, denying its motion to reconsider the June 24, 2016 order, which granted partial summary judgment in favor of Brewster Association; (2) the April 7, 2017 Agreed Dismissal Order, and (3) the June 24, 2016 order which granted partial summary judgment.

¶ 18 Before turning to the merits of the appeal, we must first address the claim raised by Brewster Association that this court is without jurisdiction to hear the appeal. Brewster argues that Tomasetti's October 13, 2017 notice of appeal was untimely because it was filed more than 30 days after the Agreed Dismissal Order and that the Agreed Dismissal Order disposed of "all of the then-remaining claims" in the case. We disagree.

¶ 19 Contrary to the assertion of Brewster Association, the Agreed Dismissal Order did not dispose of "all of the then-remaining claims" in the case. It is clear from the June 24, 2016 transcript of proceedings, the partial summary judgment order entered that same day, and the text of the Agreed Dismissal Order, that a final order disposing of Count I of Tomasetti's amended counterclaim had not been entered as of the entry of the Agreed Dismissal Order. The record reflects that, after granting partial summary judgment, the circuit court intended to retain jurisdiction over Tomasetti's claim for indemnity from Brewster Association as evidenced by: (1) its statement that, notwithstanding the entry of "partial summary judgment" in favor of Brewster Association, Tomasetti would be able to file a post-trial motion seeking indemnification; (2) the text of the June 24, 2016 order, stating that the partial summary judgment in favor of Brewster Association was "without prejudice" to Tomasetti's right to bring a post-trial motion seeking indemnification from Brewster Association; and (3) that portion of the April 7, 2017 order which specifically provided that count I of Tomasetti's amended counterclaim was "unaffected" by the dismissal of the other pending claims.

¶ 20 A judgment is final “if it determines the litigation on the merits so that the only step remaining is proceeding with the execution of the judgment.” *Catlett v. Novak*, 116 Ill. 2d 63, 68 (1987). When, as in this case, a circuit court, in rendering judgment against the plaintiff on a cause of action contained within a complaint, invites the plaintiff to file a subsequent pleading seeking the same relief, the judgment order is not a final order. We believe that the circuit court’s invitation that Tomasetti file a post-trial motion seeking indemnification from Brewster Association was the functional equivalent of granting Tomasetti leave to file an amended counterclaim after the disposal of the remaining claims in the underlying second amended complaint. The circuit court’s order inviting a post-trial motion seeking indemnity from Brewster Association indicated that the partial summary judgment was not a final order. See *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 585 (2003). It is for these reasons that we conclude that the June 24, 2016 order granting partial summary judgment in favor of Brewster Association on Count I of Tomasetti’s amended counterclaim was not a final order and, as a consequence, the claim remained unresolved after the entry of the April 7, 2017 Agreed Dismissal Order.

¶ 21 A notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from. Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). However, it was not until the circuit court denied Tomasetti’s post-trial motion to reconsider and modify the order granting partial summary judgment in favor of Brewster Association on Count I of its amended counterclaim that the claim was finally disposed of, thus ending the litigation in its entirety. Because the September 15, 2017 order denying Tomasetti’s post-trial motion finally disposed of the only remaining pending claim in the litigation, it was the final order which rendered all prior orders appealable, and commenced the running of the 30 day period for the

filing of a notice of appeal. See *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502-04 (1997). Tomasetti filed its notice of appeal on October 13, 2017, within 30 days of the entry of the September 15, 2017 final order, thus invoking this court’s jurisdiction under Illinois Supreme Court Rule 301. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994).

¶ 22 Turning to the merits of the appeal, Tomasetti maintains that the circuit court erred when it granted partial summary judgment in favor of Brewster Association and when it denied its motion to reconsider the grant of partial summary judgment because it was entitled to indemnification for its own negligence under paragraph 2 of the Agreement. We agree.

¶ 23 The purpose of a summary judgment motion is to determine the existence or absence of a genuine issue of material fact. *Carruthers v. B. C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974). Summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2014); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Summary judgment is proper procedure when the construction of an agreement is at issue. *USG Interiors, Inc. v. Commercial & Architectural Products, Inc.*, 241 Ill. App. 3d 944, 947 (1993). Our review of a summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). A motion to reconsider an order granting summary judgment raises a question of law as to whether the judge erred in his previous application of existing law, and a denial of such a motion is reviewed *de novo*. *Pence v. Northeast Illinois Regional Commuter R.R. Corp.*, 398 Ill. App. 3d 13, 16 (2010).

¶ 24 “An indemnity agreement is a contract and is subject to contract interpretation rules.” *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). “The primary goal of contract interpretation is to give effect to the parties’ intent by interpreting the contract as a

whole and applying the plain and ordinary meaning to unambiguous terms.” *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008); see also *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007) (“A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties’ intent”). A contract must be construed as a whole, viewing each part of the contract in light of the others. *Id.* (citing *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 98 Ill. 2d 109, 122–23 (1983)).

¶ 25 Paragraph 2 of the Agreement provides that Brewster Association is required to indemnify Tomasetti from any and all claims, suits, demands, damages, losses, judgments, payments, awards and expenses arising out of Brewster Association’s negligence, the negligence of any contractor hired by Brewster Association in performing work or supplying materials, “or the negligence of any other party relative to the project except that,” Tomasetti is liable for “all claims, damages, losses, judgments and expenses due to [its] sole negligence.”

¶ 26 Tomasetti asserts that the plain language of “the negligence of any other party” in paragraph 2 of the Agreement included itself, and that Brewster Association was required to indemnify it for its own negligence, except that Brewster Association was not required to indemnify it for its sole negligence. Again, we agree.

¶ 27 This court has held that “[t]he words ‘any and all’ are all inclusive.” *Haynes v. Montgomery Ward & Co.*, 47 Ill. App. 2d 340, 346, (1964). “[A]n indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract [citations] or such intention is expressed in unequivocal terms.” *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 316 (2008) (citing *Westinghouse Electric Elevator Co. v. La Salle Monroe Building Co.*, 395 Ill. 429, 433 (1946)).

In the absence of limiting language that expressly restricts indemnification liability, indemnity clauses that provide indemnity to an indemnitee for “any and all claims” may indicate that the parties intended to indemnify an indemnitee for its own negligence. *Buenz*, 227 Ill. 2d at 316.

¶ 28 We find *Buenz* to be instructive in this case. In *Buenz*, Frontline, the indemnitor, and COSCO, the indemnitee, entered into an equipment interchange agreement which contained an indemnity clause, which provided in pertinent part:

“[Frontline] shall indemnify The Line [COSCO] against, and hold The Line [COSCO] harmless for any and all claims, demands, actions, suits, proceedings, costs, expenses, damages, and liability, including without limitation attorney’s fees, arising out of, [in] connection with, or resulting from the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of The Line [COSCO].” *Id.* at 306.

In finding that this indemnity clause required Frontline to indemnify COSCO for COSCO’s own negligence, our supreme court reasoned that the contract contained “no limiting language to suggest that the indemnity provided is not intended to cover claims resulting from COSCO’s own negligence.” *Id.* at 317–18. It further reasoned that:

“Frontline did not agree to indemnify COSCO for ‘any and all’ claims arising out of Frontline’s negligence. Instead, Frontline agreed to indemnify COSCO for ‘any and all claims * * * arising out of * * * the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of COSCO.’ This agreement is very broad and, considering its common unambiguous meaning, encompasses even claims which arise out of COSCO’s negligence.” *Id.* at 318.

¶ 29 In the case at bar, Brewster Association agreed to indemnify Tomasetti for “any and all claims” arising out of the negligence of “any other party relative to the project.” “The words ‘any and all’ are all inclusive.” See *Haynes*, 47 Ill. App. 2d at 346. The language of “any other party,” in the instant case, just like the language of “any and all claims” in the *Buenz* case, is broad. Brewster Association did not merely agree to indemnify Tomasetti for “any and all” claims arising out of its own negligence or the negligence of a contractor hired by it, but it also agreed to indemnify Tomasetti for “any and all” claims arising out of the negligence of “any other party relative to the project.” Considering the common and unambiguous meaning of “any other party,” this language encompasses claims which arise out of Tomasetti’s own negligence. *Buenz*, 227 Ill. 2d at 318.

¶ 30 The Agreement did not obligate Brewster Association to indemnify Tomasetti for its “sole negligence,” which is apparent from the exception in paragraph 2 which states, “subject to paragraph 8, TT [Tomasetti] shall be liable for claims, damages, loses, judgments, and expenses due to the sole negligence of TT [Tomasetti].” This court has found that the plain, unambiguous meaning of “sole negligence” implies “exclusively or entirely” or “single-handedly.” *A-1 Roofing Co. v. Navigators Insurance Co.*, 2011 IL App (1st) 100878, ¶ 17. In order for the exception for Tomasetti’s “sole negligence” to apply, the damages sustained by the original plaintiffs must have arisen exclusively from the negligence of Tomasetti to the exclusion of the negligence of Brewster Association, the negligence of any contractor hired by Brewster Association, or the negligence of any party, including the non-exclusive negligence of Tomasetti. Whether the damages sustained by the original plaintiffs were the result of the exclusive negligence of Tomasetti has yet to be determined.

¶ 31 Accordingly, we find that the circuit court erred when it entered the order granting

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Brewster Association's motion for partial summary judgment and when it denied Tomasetti's motion to reconsider the order granting partial summary judgment. As such, we reverse and remand for proceedings consistent with this order.

¶ 32 Reversed and remanded.