2012 IL App (1st) 110782-U

FIFTH DIVISION
May 11, 2012

No. 1-11-0782

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TETRA TECH, INC., d/b/a WESTERN UTILITY CONTRACTORS, INC.,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	No. 10 M1 141066
M&J UNDERGROUND, INC.,	)	Honorable Laurence J. Dunford,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Where plaintiff filed two-count complaint for breach of contract and negligence against defendant, trial court's grant of summary judgment affirmed. Contract at issue had terminated and was no longer enforceable and plaintiff had no damages as a result of defendant's alleged negligence.

¶ 2 Plaintiff, Tetra Tech, Inc., d/b/a Western Utility Contractors, Inc., filed a two-count complaint against Defendant, M & J Underground, Inc., alleging breach of contract and negligence. The trial court granted summary judgment for defendant. Plaintiff now appeals. We

affirm.

¶ 3 BACKGROUND

¶ 4 On January 1, 2006, the parties entered into a contract, entitled "Subcontractor's Agreement" (2006 Agreement). Defendant was the subcontractor; plaintiff was the contractor. The 2006 Agreement contained an indemnification provision which provided for indemnification of plaintiff by defendant for, among other things, any claims against plaintiff, "including, but not limited to, court costs, reasonable attorneys' fees and expenses" resulting from defendant or defendant's employees' negligence in the performance of defendant's work.

¶ 5 On March 6, 2007, plaintiff's president, Timothy Hayes, sent a letter to defendant and enclosed a proposed 2007 Agreement which was different from, and intended to replace, the 2006 agreement. Notably, the 2007 agreement stated that it would continue for a one-year term and the term would be automatically renewed unless terminated by one of the parties giving written notice to the other party. The 2007 Agreement was never signed.

¶ 6 On May 5, 2008, defendant's employee, Ken Tsilis was injured when he dropped a manhole cover on his foot while working on a job site located at 47th Street and Archer Avenue in Chicago, Illinois. A claim was filed with defendant's workers' compensation insurance company, West Bend Mutual Insurance Company (West Bend).

¶ 7 On May 14, 2008, West Bend denied Ken Tsilis's claim. The letter of denial stated, in relevant part:

> "Your report of the injury indicates that at the time of the accident you were doing work for Western Utility Contractors, which is a division of Tetra Tech, Inc.

> Western Utility Contractors told you where you were going to be working, what the job number was, and what time to report for work. You used equipment that was owned and provided by Western Utility. You were acting in the best interest for Western Utility Contractors at the time of the accident on 5/5/08.
>
> Therefore, West Bend Mutual Insurance Company has no alternative but to respectfully deny this as a compensable worker's compensation claim. You were not in the course nor the scope of employment with M and J Underground when this injury occurred.
>
> Please contact Tetra Tech Inc., or Western Utility Contractors, and have a first report of injury submitted to their workers compensation insurance company, Ace American."

On August 5, 2008, Tsilis filed a workers' compensation claim against plaintiff. According to the record, the claim is currently pending before the Illinois Workers' Compensation Commission.

¶ 8 On May 5, 2010, plaintiff filed the two-count complaint against defendant. Count I of plaintiff's complaint alleged breach of contract; Count II alleged negligence. Plaintiff asserts it is now faced with the expense of litigating Tsilis's workers compensation matter. Plaintiff contends it has sustained damages, and will incur damages in the future. These asserted damages included attorney fees, expenses, and workers compensation benefits paid.

¶ 9 On September 15, 2010 and October 20, 2010, Hayes's deposition was taken. Hayes testified that he was not certain whether plaintiff had paid any of Tsilis's claim.

¶ 10 On October 26, 2010, defendant filed a motion for summary judgment. Defendant argued that plaintiff had no standing to bring the instant lawsuit where it failed to show it sustained a loss. In the alternative, defendant argued that the 2006 contract was no longer in effect at the time of Tsilis's injury and defendant therefore had no duty to indemnify plaintiff. Defendant additionally argued that summary judgment was proper because the indemnification agreement was void and unenforceable as against public policy. Plaintiff filed its response and defendant filed a reply.

¶ 11 On January 6, 2011, the circuit court granted defendant's motion for summary judgment. The court concluded:

> (1) the 2006 contract was not applicable to the alleged accident in May 2008;
>
> (2) defendant had Workers' Compensation Insurance (West Bend);
>
> (3) West Bend's position as to coverage of Tsilis's workers' compensation claim was not a breach of contract by defendant;
>
> (4) defendant was doing work for plaintiff in 2008 pursuant to purchase orders and not the 2006 contract;
>
> (5) the 2007 contract was never agreed to and did not apply; and
>
> (6) plaintiff has no damages.

¶ 12 On February 16, 2011, the circuit court denied plaintiff's motion for reconsideration. Plaintiff now appeals. No issue has been raised regarding West Bend's determination that Tsilis was not in the course or scope of employment with M and J Underground when his injury occurred.

¶ 13 STANDARD OF REVIEW

¶ 14 Our review of the trial court's grant of summary judgment is *de novo*. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). We construe all evidence strictly against the moving party and liberally in favor of the nonmoving party. *Id.* Summary judgment aids in the expeditious disposition of a lawsuit. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32 (2004). "However, it is a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt." *Id.* "Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011).

¶ 15 If a plaintiff cannot establish each element of its cause of action, summary judgment for the defendant is proper. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 13. Although a plaintiff need not prove its case at the summary judgment stage, it must present some evidentiary facts to support the elements of its cause of action. *Id.* at ¶ 21.

¶ 16 ANALYSIS

¶ 17 *Whether the 2006 Contract Was in Effect in 2008*

¶ 18 There is no dispute here that the parties had a valid written 2006 agreement. Nor is there an issue raised regarding the interpretation of the indemnification language in the 2006 agreement. The issue is whether the 2006 agreement was in effect and enforceable at the time of Tsilis's injury. In granting summary judgment, the trial court concluded that the 2006 contract

was not applicable to the alleged accident that occurred in May 2008. Plaintiff argues that the contract is ambiguous as to its termination date and contends that summary judgment should not have been granted because there are genuine issues of material fact regarding the 2006 contract.

¶ 19 The cardinal rule of contract interpretation is to ascertain the parties' intent from the contract language. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Unambiguous contract language should be given its plain and ordinary meaning. *Id.* "Provisions as to the duration of a contract are to be construed to effectuate the intention of the parties as evidenced by the language employed." *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1103 (2002). There is no need for a court to resort to rules of construction, where a contract is unambiguous in its expression of duration. *Id*; see also *H. B. G. Corp. v. Houbolt*, 51 Ill. App. 3d 955, 962 (1977). Thus, we look to the language contained in the contract to determine whether it unambiguously provides for a termination date. "Where no termination date is ascertainable from the language itself, courts must look to surrounding circumstances to discover the intention of the parties." *Adkisson v. Ozment*, 55 Ill. App. 3d 108, 112 (1977).

¶ 20 In the instant case, the relevant provision states as follows:

> "10. The subcontractor is bond [*sic*] by this document *for a period of one (1) year from the completion of said project/contract or tasks as stated in the attachments and exhibits* and furthermore held to a Non Compete and/or Conflict of Interest agreement with the prime contractor. Completed to the satisfaction of the prime contractor and thence it is understood that the subcontractor and[/]or its agents and affiliates will not attempt to compete as a prime contractor in the time

> frames identified. It is further understood that the Prime Contractor having spent time, effort and expense to ensure its future. Removal of this clause from the body of this agreement will null and void this agreement, [w]ith respect to the contractor and its connections to the owners unless expressly authorized in writing a subcontractor will not attempt to have any direct or indirect contact with the owners or clients thence Will not Compete in any way with WUCI/Tetra Tech, Inc. and its affiliates."

¶ 21 This language referencing the termination date is unambiguous. The contract terminated one year from the completion of the work described in the attachments. Although, the plain meaning of the language is that the contract terminated *either* at the completion of said project/contract *or* terminated at the completion of tasks, plaintiff has not claimed that either was not completed. The issue we must decide is what project/tasks the 2006 Agreement involved. We look to the contract's language.

¶ 22 The 2006 Agreement states, in relevant part:

> "THIS AGREEMENT, made as of the 01 day of January 2006, by and between M & J Underground, Inc. ("Subcontractor") and Western Utility Contractors, Inc., ("Contractor") anticipates the execution of various written work orders (the "Orders") on an attached Appendix "A" and sets forth the terms and conditions pursuant to which Subcontractor will provide Contractor with equipment, materials and labor required to assist Contractor with various services as required by Contractor. Each such Order shall be subject to the terms and conditions of

> this Agreement. The services to be provided are acknowledged by both Subcontractor and Subcontractor [*sic*] to be intermittent such that applicable periods for performance of each Order shall be defined in each such Order."

The copy of the agreement attached to plaintiff's complaint does not include an Appendix "A." The record, however, contains copies of Exhibits, incorporated by reference in Article 15 of the agreement. Exhibit A is titled "Scope of Subcontract Work"[1] and is blank. Exhibit B is titled "Schedule of Prices"[2] and contains the notation: "Based on the attached proposal dated 7/21/06 and signed on 8/28/06."[3] Exhibit C is titled "Partial and Final Lien Waiver Forms." Exhibit D is titled Insurance Requirements" and specifically delineates the types of insurance that defendant was required to maintain during the term of the agreement.

¶ 23 Although not included with plaintiff's complaint, the record contains a copy of the July 21, 2006 proposal, mentioned in Exhibit B, which consists of three pages. Each page describes a one-day work order for the project located in St. John, Indiana, and lists the price to be paid to, and the labor and equipment to be provided by, defendant.

¶ 24 The contract needs to be read in conjunction with the proposal and work orders. In *H. B. G. Corp. v. Houbolt*, 51 Ill. App. 3d 955, 959 (1977), this court noted that courts may, and often

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[1] Article 15 of the agreement entitles Exhibit A as "Statement of Services."

[2] Article 15 of the agreement entitles Exhibit B as "Payment Schedule."

[3] In his affidavit, Timothy Hayes, plaintiff's president states that "the version [of Exhibit B] contained in [defendant's] records does not contain such a qualification/notification" but is blank, similar to Exhibit A.

do, consider several separate writings to determine the nature of an agreement. There, in order to determine when a non-competition agreement expired, the court decided that the employment contract and the sale agreement "must and should be read together." *Id.* at 962. Reading the 2006 Agreement together with the attachments, we conclude that the contract applied only to the project in St. John, Indiana.

¶ 25 Plaintiff contends, however, that the 2006 Agreement did not involve only the project in St. John, Indiana, described in the proposal attached to the contract. Plaintiff asserts that the language of the contract indicates that it was intended to encompass, not only that project, but multiple projects. Plaintiff notes that the contract language refers to the scope of work "required for the construction of the Project at various locations in the Chicago and surrounding suburbs." The contract also provides that "[a]ssignments will be conducted at various locations" and refers to services required of defendant "at a given location." We do not believe that this general language contradicts the express language describing the project as evidenced in the 2006 Agreement and its attachments.

¶ 26 Plaintiff also notes, however, that in response to defendant's motion for summary judgment, plaintiff submitted an affidavit of Timothy Hayes, in which he stated: "Although, after a diligent search, I have been unable to locate the original proposal for the 47th Street and Archer Avenue project, I affirmatively state that it was incorporated into the January 1, 2006 subcontractor agreement." Thus, similar to his testimony during his prior depositions, Hayes gave a subjective opinion that the 2006 Contract was in existence and enforceable at the time of Tsilis's injury. This testimony is not sufficient to overcome defendant's summary judgment

motion. See, *e.g.*, *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1005 (2011) ("[S]ummary judgment affidavits must contain not conclusions but only evidentiary facts to which the affiant is capable of testifying. [Citations.] Unsupported assertions, opinions, and self-serving or conclusory statements do not comply with the rule governing summary judgment affidavits.").

¶ 27 In sum, we agree with the trial court that the 2006 contract was no longer in effect in May 2008 when Ken Tsilis was injured. The termination date of the contract was one year from the completion of the work described in the attachments. The work proposals attached to the 2006 contract were for three days of work. They were dated July 21, 2006 and were signed on August 28, 2006 by plaintiff's representative. Thus, the termination date was either July 21, 2007 or August 28, 2007. We agree with defendant that this ambiguity is moot because the very latest date that defendant agreed to be bound by the 2006 agreement, August 28, 2007, was well before Ken Tsilis's injury date of May 5, 2008. Plaintiff has not shown, or even alleged that the "said project" (located in Indiana as referred to in the attachments) was not completed in 2006. Plaintiff has also not alleged or shown that the tasks described in the three one-day work orders were not completed in 2006.

¶ 28 Plaintiff raises an additional argument, however, as to why the contract language regarding the termination date is ambiguous. Plaintiff asserts that the "biggest ambiguity in this matter is whether the 'one year' language applies only to the non-compete terms [in section 10 quoted above] or to all terms of the 2006 Agreement." Plaintiff contends that use of the term "document" creates an ambiguity because the entire 2006 Agreement refers to "agreement" or

"contract documents" and the 2006 Agreement is not referred to as "this document" elsewhere. We disagree.

¶ 29 There is no other document and there is no separate non compete agreement. Moreover, the plain language stating that "[t]he subcontractor is bond [*sic*] by this document for a period of one (1) year from the completion of said project/contract or tasks as stated in the attachments and exhibits *and furthermore held to a Non Compete and/or Conflict of Interest agreement* with the prime contractor." Thus, the noncompete agreement is a separate contractual term from the expiration term. Moreover, plaintiff's argument that the phrase "this document" is distinguishable from the use of the word "agreement" would apply equally to the Non Compete and/or Conflict of Interest *agreement.* "A contract is not ambiguous merely because the parties disagree on its meaning; ambiguity exists where language is obscure in meaning through indefiniteness of expression." *Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676. The contract language here, although arguably poorly drafted, is unambiguous regarding the termination date of the 2006 agreement.

¶ 30 In view of the foregoing, the trial court correctly granted defendant's motion for summary judgment. The 2006 Agreement had terminated prior to Ken Tsilis's injury. Thus, plaintiff was not entitled to indemnification from defendant. In view of our decision, we need not address the additional grounds contained in defendant's motion for summary judgment.

¶ 31 We next address the negligence count contained in plaintiff's complaint. In its response to defendant's summary judgment motion, plaintiff argued that defendant failed to address the negligence count. Defendant, however, asserted that plaintiff "failed to set forth any evidence to

establish the last element required in *each* of its causes of action: injury." (Emphasis added.) As noted, the trial court concluded that plaintiff had "no damages." Plaintiff alleged that Ken Tsilis was injured due to defendant's negligence. With respect to its own alleged injury, however, plaintiff specifically stated:

> "As a proximate result of the breach of the duties and obligations in said subcontract agreement by defendant, plaintiff has sustained damages and will continue to incur damages in the future, including, but not limited to attorneys' fees, workers' compensation benefits paid, and expenses incurred."

Thus, plaintiff's negligence count was derivative of, and dependent upon the enforceability of the 2006 Agreement. In view of our determination that the agreement had terminated, the trial court's decision that plaintiff had no damages was correct. Therefore, plaintiff cannot meet its burden of proving damages for negligence and summary judgment was correct.

¶ 32 CONCLUSION

¶ 33 We affirm the decision of the circuit court of Cook County granting summary judgment in favor of defendant, M & J Underground, Inc. and against plaintiff, Tetra Tech, Inc., d/b/a Western Utility Contractors, Inc.

¶ 34 Affirmed.