2016 IL App (1st) 142655-U

SECOND DIVISION
February 16, 2016

No. 14-2655

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LEXINGTON MARKETING, LLC, Plaintiff-Appellant, v. FRANKS MECHANICAL CONTRACTORS, INC. Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2013 L 002362 Honorable Raymond Mitchell, Judge Presiding

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JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing plaintiff's complaint. Plaintiff's right to recover for breach of contract was barred by the parties' allocation of risk provisions. Plaintiff's right to recover in tort was barred by the economic loss doctrine.

¶ 2 This case is on appeal of the trial court's order granting defendant's motion to dismiss plaintiff's complaint pursuant to section 2–619.1 of the Code of Civil Procedure. 735 ILCS 5/2-619.1 (West 2012). Plaintiff Lexington Marketing ("Lexington") argues on appeal that the trial court improperly held that its right to recover against defendant Franks Mechanical Contractors

("Franks") for breach of contract was barred by the parties' agreement to allocate the risk of loss arising from Franks' negligent actions to Lexington's insurer. In addition, Lexington argues that the trial court erred when it held that Franks' right to recover in tort was barred by the economic loss doctrine. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Lexington is the owner of a high rise condominium building in Chicago, Illinois ("Building"). Lexington contracted with Kenny Construction Company ("Kenny") to be the general contractor for the construction of the Building. Kenny, in turn, hired Franks to do the plumbing work for the Building. On November 6, 2009, two copper pipes installed by Franks separated near the top of the Building causing water to leak and spread throughout the Building. The Building incurred significant damage. As a result of the water leak, Lexington received a payment from its builder's risk property insurer, Travelers Property and Casualty Company of America ("Travelers"), in the sum of $19,753,750 for the damages pursuant to two "Loan Receipt Agreements." The loan receipt agreements provided that the loan was non-interest bearing and repayable "only in the event and to the extent of any recovery the Borrower, or the Company of behalf of the Borrower may make from any persons(s) and/or entity(ies) for any damages to the [Building]" resulted from the November 6, 2009 water leak.

¶ 5 The contract between Lexington and Kenny consisted of a "Standard Form Agreement between Owner and Construction manager" which incorporated the "General Conditions of the Contract for Construction." These two documents will be referred to as the "Prime Contract." The Prime Contract contains provisions relating to insurance and a waiver of subrogation that provide, in relevant part:

"4. The contractor will obtain and maintain the following insurance coverage set forth bellow, and submit to the Owner and Lender, duplicate originals of all policies, declaration pages, endorsements and certificates from the Contractor's insurance carriers within 90 days of loan closing, or as reasonably soon as the documents are available, indicating coverage for the following:

A. Worker's Compensation and Employer's Liability Insurance

Worker's Compensation and Employer's Liability Insurance covering all employees who are to provide a service under this agreement.

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C. All Risk Property Insurance

Owner shall procure Builder's Risk insurance for the Project. Owner is responsible for deductibles under such insurance, except to the extent set forth below for any loss caused any negligence on the part of the Contract[or] and Subcontractors. The Builders Risk policy shall include the following provisions: a) A named insured provision that includes the Contractor and Subcontractors as insureds. b) A waiver of subrogation endorsement in favor of the Contractor and all subcontractors. c) A subrogation clause allowing the insured to waive recovery rights against others in writing prior to loss. Copies of the Named Insured and Waiver of Subrogation Endorsements and the subrogation clause shall be submitted to the Contractor within 90 days of loan closing, or as reasonably soon as the documents are available. The Contractor and Subcontractors shall be responsible for the first $10,000 of any loss caused by negligence. The Contractor shall be responsible for all loss or damage to personal

property (including but not limited to material, equipment, tools and supplies) owned or rented by the Contractor.

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6. SubContractors' Insurance

A. The Contractor shall require all its subcontractors of every tier to carry applicable types of insurance required by this Section and to comply with all requirements set forth above, including but not limited to, in amounts and with limits acceptable to Owner and Lender, and naming as additional insureds those entities referred to above in Paragraph 1, to cover their liability assignment of and resulting from ongoing and completed work and operations of the Contract and which shall be issued on a primary and non-contributory basis.

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11.4.2 Waiver of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their contractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, 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 Section 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by

> appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. 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."

¶ 6 The subcontract between Kenny and Franks ("Subcontract") required Franks to purchase Workers Compensation, Commercial General Liability Insurance "including coverage for independent contractors, together with Product Liability and completed operations extending for at least twenty four (24) months after completion of operations," Occupational Disease Insurance, Employer's Liability Insurance, and Excess Liability Insurance. Pursuant to the Subcontract, Franks purchased commercial general liability coverage from Acuity Insurance ("Acuity"). On or about October 2, 2009, and on or about October 15, 2015, a valve and a pipe respectively, installed by Franks leaked water resulting in damage to the Building. Acuity paid for the damages incurred as a result of these two leaks the sums of $8,209.70 and $9,163.47 respectively.

¶ 7 The Subcontract contained an indemnification provision and a provision barring third party beneficiaries stating in pertinent part:

> "3. To the fullest extent permitted by law, Subcontractor agrees to indemnify, defend and save harmless Owner, Contractor, Contractor's consultants, if any, and where required by Contract, Owner's lenders, architects, and consultants if any *** and each of them, from and against any and all claims, demands, suits,

> actions, expenses, judgment, loses, and liabilities, including fines and penalties, costs and attorneys, consultants and experts' fees claimed to arise from violation of any codes, rules, ordinances, statutes or regulations, occasioned by or growing out of the execution or performance of Work hereunder by Subcontractor or Subcontractor's subcontractors of any tier. ***
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> ***
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> 5. It is the intention of the parties and hereby expressly agree that no provision of this Agreement shall in any way inure to the benefit of any third person (including the public at large) not expressly stated herein and no person shall be deemed a third party beneficiary of this Agreement or of any one or more of the terms thereof. Nothing in this Agreement shall otherwise give rise to any cause of action in any person not a party hereto."

¶ 8 On November 13, 2013, Lexington filed its amended complaint alleging negligence, willful and wanton misconduct, and breach of contract arising out of Franks' negligent plumbing work. The complaint alleged that the November 6, 2009, water leak caused extensive physical damage to the Building and to "other property such as refrigerators, microwaves, stoves/ovens, workout equipment, fixtures, furniture, contents and other items of Lexington's personal property." The complaint stated that Lexington suffered in excess of $20 million in damages for which Franks and its insurer have continually refused to pay.

¶ 9 Franks moved to dismiss the amended complaint arguing that the negligence and willful and wanton counts were barred by the economic loss doctrine while the breach of contract count was barred by the waiver of subrogation provision contained in the Prime Contract. On April 17, 2014, the circuit court granted Franks' motion to dismiss. The circuit court held that the

negligence and willful and wanton counts were barred by the economic loss doctrine for property covered by the Prime Contract. To the extent that the negligence and willful and wanton counts sought recovery for property not covered by the Prime Contract, or "other property," the circuit court found that Lexington's claims were not barred by the economic loss doctrine and directed Lexington to file another amended complaint to simplify matters. The circuit court held that the breach of contract claim was barred because the parties foresaw the potential property loss occurring through Franks' negligence and allocated the risk to Lexington's insurer. The court noted that, pursuant to Prime Contract, Lexington waived its right to proceed against Franks for the losses alleged in the instant case.

¶ 10 On May 6, 2014, Lexington filed a Rule 304(a) motion requesting the court to enter a finding that there was no just reason to delay enforcement or appeal of the court's order involuntary dismissing part, but not all, of Lexington's first amended complaint. The trial court denied Lexington's Rule 304(a) motion. Subsequently, Lexington filed a motion pursuant to 735 ILCS 5/2-1009(a) (West 2012) to voluntarily dismiss "all remaining claims except those previously dismissed by the court in the order of April 17, 2014." The trial court granted Lexington's motion for voluntary dismissal, with leave to refile, for property not covered by the Prime Contract.

¶ 11 ANALYSIS

¶ 12 Jurisdiction on Appeal

¶ 13 Neither party has raised the issue of this court's jurisdiction to decide this appeal. Even though not raised by a party, prior to deciding the merits of an appeal, an appellate court has the duty to determine whether the appeal has been properly taken so as to invoke its jurisdiction. *People in Interest of A.M. v. Herlinda M.*, 221 Ill. App. 3d 957, 962 (1991). We have

jurisdiction to review final judgments. *Shermach v. Brunory*, 333 Ill. App. 3d 313, 316 (2002). A judgment is final when all claims have been disposed of and there is nothing left for the trial court to do. *Id.* When a trial court involuntarily dismisses some but not all claims and the rest of the claims are voluntarily dismissed by the party, the involuntary dismissal order, which is already final, becomes final and appealable, the case is terminated in its entirety, and the trial court loses jurisdiction of the case. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503 (1997).

Here, nearly all of Lexington's claims were involuntarily dismissed by the trial court. Specifically, the trial court granted Franks' motion to dismiss Counts I (negligence), II (willful and wanton misconduct), and III (breach of contract) of Lexington's first amended complaint. The only claim remaining was a negligence claim for damages outside the scope of the Prime contract at issue in the case. Lexington wanted to appeal. It first sought to do so under Rule 304(a) which the trial court refused, presumably because there was little left to resolve in the case and we have repeatedly instructed trial courts that 304(a) findings should be granted sparingly. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 544 (2011). So, in order to take its desired appeal, Lexington elected to dismiss its case, make it final, and take an appeal.

There is some potential apprehension about the fact that the trial court indicated in the order granting the voluntary dismissal that Lexington's "case [was] dismissed with leave to refile." But the motion was brought under 735 ILCS 5/2-1009(a). All voluntary dismissals under that section come with leave to refile. In the very same order, the trial court struck all remaining court dates and indicated that "[t]his is a final order that disposes of the case in its entirety." It is also important that the trial court used the term "refile." The trial court did not

give leave to amend or replead. When a party refiles a voluntarily dismissed case, "the refiled action is an entirely new and separate action, not a reinstatement of the old action." *Dubina v. Mesirow Realty Development., Inc.*, 178 Ill. 2d at 504. "Because they are distinct actions, when the original action was terminated, the circuit court lost jurisdiction of the original action and all final orders became appealable under Rule 301." *Id*. The trial court did not keep the original action going. It simply laid out what is already laid out in section 2-1009(a) and controlling case law, that the plaintiff can refile the part of its case that it voluntary dismissed.

¶ 14 Finally, one can foresee a possible issue concerning the fate of the claims that Lexington voluntarily dismissed. Lexington may attempt to argue that the trial court gave it an open-ended invitation to refile. Lexington pursued a strategy in order to take an appeal once its request for a 304(a) finding was denied. If that course of action results in Lexington's voluntarily dismissed claims being barred by *res judicata* or as a violation of the rule against claim splitting, it is a matter of Lexington's own strategic decisions. In addition, Lexington admits that their ability to refile was subject to a "one year *deadline*" and that it let that time period lapse. Lexington's decision regarding the "other property" claim has no affect on our jurisdiction to hear the appeal of the involuntarily dismissed claims which were final orders, and became final and appealable when Lexington took its voluntary dismissal.

¶ 15 On appeal, Lexington argues that the trial court erred when it dismissed its breach of contract count because the court erroneously determined that the parties allocated the risk of loss arising from Franks' negligent plumbing to Lexington. In addition, Lexington contends that the trial court erred in dismissing Lexington's tort claims pursuant to the economic loss doctrine.

¶ 16 Franks' motion to dismiss was brought pursuant to section 2–619.1 of the Code of Civil Procedure, which allows a party to move for dismissal under both sections 2–615 and 2–619. 735

ILCS 5/2–619.1 (West 2010). A section 2–615 motion to dismiss attacks the legal sufficiency of a complaint. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29. A motion brought pursuant to section 2–619 admits the sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats that claim. *Id.* We review a dismissal under either section 2–615 or section 2–619 *de novo. Id*.

¶ 17 I. Breach of Contract Count

¶ 18 Lexington argues that the circuit court erroneously determined that the parties allocated the risk of loss arising out of Franks' negligence to Lexington's insurer pursuant to the Prime Contract. Lexington contends that the provision of the Prime Contract requiring Lexington to purchase builder's risk insurance is ambiguous and that the parties allocated the risk of the loss to Franks. Specifically, Lexington claims that the Prime Contract required Franks to obtain "completed operations" coverage which was "primary and non-contributory" to any insurance purchased and maintained by Lexington. In addition, Lexington contends that the Subcontract provided that Lexington's insurance would apply in excess of the coverage provided by Franks' insurance carrier. According to Lexington, when read together, as the parties intended, the Prime Contract and the Subcontract allocated the risk of loss resulting from Franks' negligent plumbing to Franks' "completed operations insurance" carrier. Lexington bases its right to bring a claim on the Subcontract on the argument that it is an intended third-party beneficiary to the Subcontract.

¶ 19 In turn, Franks argues that the trial court correctly determined that Lexington's right to recover against Franks was barred by the waiver of subrogation provision in the Prime Contract. Franks argues that Lexington's builder's insurer, Travelers, paid Lexington the sum of $19,753,750 for the damage to the Building arising out of the water leak and that Lexington was not required to repay these funds to Travelers. According to Franks, Lexington's loss was

covered by property insurance to the extent of Traveler's payment regardless of whether Travelers and Lexington agreed to label this payment as a "loan." Furthermore, Franks contends that the Prime Contract unambiguously required Lexington to obtain all-risk property insurance and that Franks' obligation to obtain "completed operations" coverage which was "primary and non-contributory" was part of Franks' broader obligation to obtain liability insurance coverage. Franks argues that its obligation to obtain liability insurance did not defeat Lexington's agreement to waive subrogation for claims covered by property insurance. Alternatively, Franks contends that Lexington cannot sue Franks for breach of contract, as Lexington is neither a party nor a third-party beneficiary of the Subcontract.

¶ 20 We agree with the circuit court's determination that Lexington's recovery was barred by the waiver of subrogation provision contained in the Prime Contract. A waiver is the intentional relinquishment of a known right, which may be made by express agreement or implied from the conduct of the party alleged to have committed waiver. *Home Ins. Co. v. Bauman*, 291 Ill. App. 3d 834, 837 (1997). Waiver of subrogation provisions allow the parties to a construction contract to exculpate each other from personal liability in the event of property loss or damage to the work to the extent that each party is covered by insurance. *Intergovernmental Risk Management On Behalf of Village of Bartlett v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc.*, 295 Ill. App. 3d 784, 792-93 (1998). [T]he insurance clause shifts the risk of loss to the insurance company regardless of which party is at fault. *Id*. at 793. The waiver of subrogation, therefore, avoids the prospect of extended litigation which would interfere with construction. *Id*.

¶ 21 In *Village of Rosemont v. Lentin Lumber Co.*, 144 Ill. App. 3d 651, 659 (1986), this court held that waivers of subrogation are enforceable and place all risk of loss on the party's property

insurer. In *Rosemont*, the plaintiff-owner of a construction project, Rosemont Horizon Arena, sought to recover damages against a contractor and two subcontractors for breach of contract and negligence after a portion of the roof collapsed during the construction of the project. *Rosemont*, 144 Ill. App. 3d at 656. In *Rosemont*, the waiver language that the court enforced was similar to the waiver language used in the Prime Contract. Specifically, in *Rosemont*, the parties agreed to "waive all rights" against each other "for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to Paragraph 11.3 or any other property insurance applicable to the work." *Id.* at 657. The court held that the parties' agreement stated that insurance alone would provide recovery for any property loss or damage to the work. *Id.* The court noted that the parties specifically agreed that the responsibility for obtaining that insurance belonged to the plaintiff-owner and that the type of insurance to be purchased was all-risk insurance. *Id.* at 659.

¶ 22 Similarly, in the instant case, the parties to the Prime Contract agreed that Lexington's insurance carrier would bear the risk and would provide recovery for any property damage arising out of a subcontractor's negligent work. The Prime Contract unambiguously states that the parties agreed to "waive all rights against *** 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 Section 11.4 or other property insurance applicable to the Work." Here, as in *Rosemont*, the parties to the Prime Contract specifically agreed that the responsibility for obtaining an all-risk builder's insurance for the "the Project" belonged to Lexington as the owner of the Building. "The Project" includes "the Work" a term that is defined in the Prime Contract to include the entire construction whether "partially completed or completed." Therefore, under the plain language of the Prime Contract, the parties

agreed that Lexington was required to carry all risk property insurance covering the entire construction and that insurance alone would provide recovery for any property loss or damage to the Building.

¶ 23 Furthermore, although not a party to the Prime Contract, Franks can enforce the waiver of subrogation provision because it is a third-party beneficiary to the Prime Contract. The plain language of section 11.4 stating that the parties "waive all rights against *** each other and any of their subcontractors" indicates that the contracting parties intended to confer this benefit directly upon nonparty subcontractors. See *Home Ins. Co. v. Bauman*, 291 Ill. App. 3d at 839.

¶ 24 Nonetheless, Lexington claims that the circuit court erred in ignoring some conflicting provisions of the Prime Contract and the Subcontract that contradicted the waiver of subrogation provision and shifted the risk of loss to Franks and its "completed operations" insurer. Lexington argues that the loss arising from Franks' negligent plumbing occurred after coverage commenced under Franks' "completed operations" insurance and that the parties intended that such insurance would provide primary coverage to Lexington on a non-contributory basis.

¶ 25 However, the court in *Rosemont* rejected the plaintiff-owner's similar argument. In *Rosemont*, the plaintiff-owner argued that the portion of the construction contract requiring the contractor to obtain liability insurance, and to indemnify the owner for claims arising out the performance of the work, conflicted with the waiver of subrogation provision. *Rosemont*, 144 Ill. App. 3d at 661. The court in *Rosemont* held that the waiver of subrogation provision was part of the owner's property insurance obligations, while the insurance and indemnity provisions were tied to the contractor's liability insurance obligations. The court noted that to accept the owner's interpretation of the provisions that read the contractor's liability insurance and

indemnity obligations as creating an exception to the owner's waiver of subrogation would have rendered the waiver of subrogation provision meaningless. *Id*. at 663-64.

¶ 26 As in *Rosemont*, in the instant case, the insurance and the waiver of subrogation provisions contained in the Prime Contract and insurance provisions in the Subcontract were intended to distribute different risks and were not inconsistent. The type of insurance that Franks was required to provide and maintain under the Insurance clause in the Prime Contract and in the Indemnification and Insurance clause in the Subcontract was liability insurance such as workers' compensation, product liability, completed operations, occupational disease and employer's liability insurance. Meanwhile, the property insurance and the waiver of subrogation clause in the Prime Contract required Lexington to obtain coverage for property loss in the event of damage to the Building and to waive its rights of subrogation in favor of the contractors and subcontractors. Accordingly, the insurance provisions contained in the Prime Contract and in the Subcontract and the waiver of subrogation provision in the Prime Contract are not conflicting but represent a separate allocation of responsibility. See *Rosemont*, 144 Ill. App. 3d at 663; see also *Nodaway Valley Bank v. E.L. Crawford Const., Inc.*, 126 S.W.3d 820, 829-30 (Mo. Ct. App. 2004) ("A reasonable interpretation of the indemnification clause that is in harmony with the insurance procurement requirement and the waiver of subrogation clause is that the indemnification clause refers to compensation and liability for losses *not* covered by the property insurance policy, that is, compensation and liability to third parties").

¶ 27 Lexington argues next that the parties' conduct after "completed operations" commenced under Franks' policy indicates that the parties allocated the risk of loss to Franks' insurance carrier. Particularly, Franks indicates that Acuity, Franks' insurer, paid two claims resulting from the two water leaks that occurred in October 2009 in the Building and that no claims were made

to Travelers, Lexington's insurer. Franks argues that the water leaks from October 2009 were indistinguishable from the water leak dated November 6, 2009, that caused the instant dispute and that Franks' "completed operations" insurer should bear the loss from the latter water leak as well.

¶ 28 Lexington's argument ignores the parties' allocation of loss provisions contained in the Prime Contract. The Prime Contract provides that Lexington's builder's risk insurance is to apply to all claims "*except for the first $10,000* of any claim caused by a contractor's or subcontractor's negligence." (Emphasis Added.) The record indicates that the two previous claims each caused damages in the amount of $8,209.70 and $9,163.47 respectively. Therefore, the fact that these prior claims were paid by Acuity, Franks' liability insurer, is consistent with the parties' allocation of loss as set forth in the Prime Contract.

¶ 29 Next, Lexington argues that the trial court erred when it held that Lexington received full payment from Travelers, its property insurance carrier. Lexington contends that Lexington and Travelers entered into a "loan receipt" agreement and Lexington received a loan from Travelers, rather than a payment under the policy. Lexington argues that, because there was no insurance payment, the waiver or subrogation in the Prime Contract was, therefore, inapplicable.

¶ 30 Lexington's argument is unpersuasive. Loan receipts cannot be used to defeat a contractual waiver of subrogation because such "an interpretation would render the waiver clause meaningless, contrary to the parties' clear expression in the contract, of their intention to make a binding waiver." *Willamette-Western Corporation v. Columbia Pacific Towing Co.*, 466 F.2d 1390, 1393 (9th Cir. 1972); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc.*, 119 Wash. 2d 334, 340 (Wash. 1992). Moreover, it is undisputed that Lexington made a claim to Travelers for the damages incurred as a result of the water leak and

that Travelers paid Lexington the sum of $19,753,750 as "reimbursement" for Lexington's loses pursuant to two loans agreements. The loan agreements provided that the "loans" were non-interest bearing and repayable only in the event and to the extent of any recovery that Lexington or Travelers on behalf of Lexington "may make" from "any person(s) and/or entity(ies) for any damages for any damages to the Building." Therefore, the circuit court did not err in holding that Lexington's loss was covered and remains covered by insurance to the extent of Travelers' payment.

¶ 31 Having determined that Lexington's right to recover for breach of contract against Franks was barred by the waiver of subrogation provision in the Prime Contract, we do not need to address Lexington's supporting argument that Lexington was an intended third party beneficiary of the Subcontract.

¶ 32 II. Negligence, Willful and Wanton Misconduct Counts

¶ 33 Lexington contends next that the circuit court erred in dismissing the negligence and willful and wanton misconduct counts as alleged in Lexington's amended complaint. Lexington argues that because the amended complaint alleges that the water leak caused damage to the property "other than the property or work performed by Franks" such as "physical damage to separate condominium units, common areas, ceiling, walls, floors, refrigerators, microwaves, dishwaters, stones/ovens, workout equipment, fixtures, furniture, contents, and other items of Lexington's personal property," the damages fall outside the *Moorman* doctrine.

¶ 34 Under the economic loss doctrine or the *Moorman* doctrine, a party "cannot recover for solely economic loss under the tort theories of strict liability, negligence and innocent misrepresentation." *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 91 (1982). Economic loss is defined as "damages for inadequate value, costs of repair and replacement of

the defective product, or consequent loss of profits, without any claim of personal injury or damage to other property." *Id*. at 82. Tort law provides remedy for personal injury or property damage resulting from a sudden or dangerous occurrence while the remedy "for a loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause * * * lies in contract law." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 200 (1997). An exception to the *Moorman* doctrine exists if a plaintiff alleges a sudden or dangerous occurrence which causes damage to "other property." *Id*. at 186-87. "Mere damage to any property is not sufficient; the property must be other property, extrinsic from the product itself." *Mars, Inc. v. Heritage Builders of Effingham*, 327 Ill. App. 3d 345, 354 (2002).

¶ 35 *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 165 (1982) is illustrative. In *Redarowicz,* a home purchaser who purchased a house from an original owner sued the builder of the house upon discovering that a chimney and adjoining brick wall were beginning to pull away from the rest of the house, resulting in water leakage in the basement and roof area. *Id*. The court denied recovery under a tort theory based on the authority of *Moorman* stating that a complaint alleging qualitative defects in a product does not belong in tort. *Id*. at 177. The court held that "[a] buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects." *Id*. at 177. The court concluded that the plaintiff could not maintain an action in tort because no other property interest was damaged by the collapse of the wall and chimney.

¶ 36 Like the plaintiff in *Redarowicz,* Lexington did not allege that Franks' negligent plumbing caused an accident which resulted in physical injury or damage to other property than the Building itself. Instead, Lexington alleged that it incurred physical damage to parts or

components of the Building that were covered by the Prime Contract.[1] The alleged property damage incidental to the water leak is indistinguishable from the incidental damage alleged in *Redarowicz* which the court found to be damage consequent to the qualitative defects and not recoverable in tort. Therefore, for damages incurred for property covered by the Prime Contract, Lexington cannot maintain a tort action because the remedy for breach of contract allows a party to recover the damages resulted from the alleged negligent actions. See *In re Chicago Flood Litigation*, 176 Ill. 2d at 200.

¶ 37 Further, in an attempt to overcome the economic loss doctrine limitation for tort actions, Lexington argues that because mold formed as a result of the water loss, there was a substantial threat of personal injury from the exposure to mold that constituted an actionable damage to other property. Lexington cites *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 137 (1989), as an example of a case in which the Supreme Court allowed a tort action to proceed, notwithstanding the fact that the plaintiff school boards were seeking damages from the defendant manufacturers and distributors of asbestos-containing materials. While the court in *A, C & S*, declined to dismiss the school boards' negligence and strict liability claims as barred by the *Moorman* doctrine, the court held that its decision was based on the fact that "the nature of the ‘defect’ and the ‘damage’ caused by asbestos is unique." *A, C & S*, 131 Ill. 2d at 451. The court specifically noted that "the holding in this case should not be construed as an invitation to bring economic loss contract actions within the sphere of tort law through the use of some fictional property damage."*A, C & S*, 131 Ill. 2d at 445.

¶ 38 Nonetheless, Lexington urges us to read *A, C & S* as creating an exception to the *Moorman* doctrine for damages to other property for situations when the exposure to a harmful

[1] For damages to "other property" not subject to the Prime Contract, Lexington voluntary dismissed its cause of action.

substance such as mold requires remediation in a building. *A, C & S,* however, does not represent an exception to *Moorman. City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 418-20 (2004). Instead, *A, C & S* merely stands for the proposition that because contamination is a form of property damage, the cost of *asbestos removal* from a plaintiff's property does not constitute a solely economic loss subject to the bar of *Moorman. Id.* at 418-20 (Emphasis added.); see also *Tioga Public School District # 15 of Williams County, State of North Dakota v. United States Gypsum Co.*, 984 F. 2d 915 (8th Cir.1993) (holding that the economic loss doctrine did not bar plaintiff's claim for damages for the costs of asbestos abatement). Therefore, because the facts in the instant case do not involve the unique situations of asbestos removal, Lexington's reliance on *A, C & S* is misplaced.

¶ 39 Additionally, Lexington argues that Franks contractually waived the application of the economic loss doctrine. Specifically, Lexington claims that the provisions in the Prime Contract stating that that "[s]ubcontractors shall be responsible for the first $10,000 of any loss caused by negligence" constitutes Franks' waiver of the economic loss doctrine. Lexington claims that the indemnification provisions of the Subtract which required Franks to indemnify the Owner, Contractor and other parties for claims arising out of its work similarly constitutes a waiver of the economic loss doctrine. However, the above mentioned provisions contained in the Prime Contract and the Subcontract are not waivers but contract terms providing agreed-upon remedies and a distribution of the loss for subcontractors' potential negligent actions. See *In re Chicago Flood Litigation*, 176 Ill. 2d at 200. These terms provide a contractual remedy and do not represent a waiver of a tort remedy for Franks' negligence.

¶ 40 In sum, the trial court did not err in dismissing the negligence, willful and wanton misconduct counts as they are barred by the economic loss doctrine. For property covered by the

Prime Contract, the losses to the Building were contractually allocated to Lexington's property insurer. Lexington voluntarily dismissed its claim for damages to "other property" outside the Prime Contract.

¶ 41 CONCLUSION

¶ 42 Based on the foregoing, we affirm the trial court's judgment.

¶ 43 Affirmed.