

STATE OF MICHIGAN
COURT OF APPEALS

SANDY MATUSAK,

Plaintiff,

v

HOUSEMAN CONSTRUCTION CO.,

Defendant/Counter-Defendant,

and

BRIGADE FIRE PROTECTION, INC.,

Defendant/Counter-Defendant-
Appellant,

and

LARRY V. SHAY TRUST,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

October 18, 2012

No. 306904

Kent Circuit Court

LC No. 10-002321-NO

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over an indemnification clause, defendant/counter-defendant Brigade Fire Protection, Inc. (Brigade Fire) appeals by right the trial court's order granting summary disposition in favor of defendant/counter-plaintiff Larry V. Shay Trust (the Trust). On appeal, Brigade Fire argues that the trial court erred when it ordered Brigade Fire to indemnify the Trust for the amount that the Trust paid plaintiff Sandy Matusak in settlement of her claim for damages arising from a slip and fall on the Trust's property. We conclude that the trial court erred when it determined that Brigade Fire was liable to indemnify the Trust. The undisputed evidence demonstrated that Matusak's claims against Brigade Fire had been dismissed and were not appealed. Because Brigade Fire had an absolute defense to Matusak's claims, the Trust could not—as a matter of law—establish that it reasonably settled Matusak's claims premised on Brigade Fire's negligence.

I. BASIC FACTS

The Trust owned a commercial property that it leased to Matusak's employer, Midwest Safety Products. In October 2007, the Trust contracted with defendant/counter-defendant Houseman Construction Company to serve as the general contractor for an addition to the property. Houseman Construction subcontracted with Brigade Fire to perform work on the property's fire suppression system. Midwest Safety remained open during the construction project.

On February 11, 2008, two workers from Brigade Fire went to Midwest Protection to replace a valve on the fire suppression system. In order to replace the valve, they had to drain the lines and did so by opening drains on the outside of the building. One drain emptied into the employee's parking lot.

The next day, Matusak came to work, worked her shift, and left at about 5 p.m. As she was walking to her car, she slipped on ice, fell, and was injured. There was conflicting testimony as to whether the snow and ice in the parking lot formed on the day of Matusak's fall or formed from the water that had been drained into the lot on the previous day.¹

In March 2010, Matusak sued the Trust, Brigade Fire, and Houseman Construction under various theories for damages arising from her slip and fall. The Trust moved for permission to file a cross-complaint against Houseman Construction and Brigade Fire in December 2010. The Trust argued that it should be allowed to file cross-claims against Houseman Construction and Brigade Fire because both had contractually agreed to indemnify the Trust for losses arising from their negligence.

In December 2010, both Houseman Construction and Brigade Fire moved for summary disposition of Matusak's claims. Brigade Fire argued that it was entitled to have Matusak's claims dismissed because she was not an intended beneficiary of its construction agreements and it did not owe her a duty that was separate and distinct from its contractual obligations. In addition, it argued that Matusak's claim that she slipped on ice that Brigade Fire had negligently caused to form was speculative. The trial court granted Houseman Construction and Brigade Fire's motions and dismissed Matusak's claims against both in March 2011. Matusak did not appeal either order.

In March 2011, the trial court also granted the Trust's motion for permission to file a cross-claim for indemnification against Houseman Construction and Brigade Fire. The Trust accepted a case-evaluation and settled with Matusak in April 2011. It then filed its cross-claims against Houseman Construction and Brigade Fire.

¹ A worker from Brigade Fire testified that all the water that they drained from the system flowed out into the parking lot and down a storm drain. He stated that there was no water left standing in the parking lot when he left at 2:30 p.m. on the day before Matusak's fall.

In May 2011, Houseman Construction moved for dismissal of the Trust's claim for indemnification on the grounds that its contract with the Trust specifically provided that it would not be liable for acts taken by its subcontractors. The trial court granted Houseman Construction's motion and dismissed the Trust's cross-claim against it in August 2011.

The Trust moved for summary disposition of its cross-claim against Brigade Fire. In support of its motion, the Trust presented evidence that it gave Brigade Fire the opportunity to defend Matusak's suit on the Trust's behalf, but Brigade Fire refused. As such, the Trust further contended, it could reasonably settle with Matusak and require Brigade Fire to indemnify it for the settlement. Brigade Fire also moved for summary disposition. In its motion, it presented evidence that Matusak's claims against it had been dismissed. It argued on that basis that the Trust could not establish that Brigade Fire's actions resulted in liability.

The trial court agreed with the Trust's position. In an order entered in August 2011, the trial court ordered Brigade Fire to indemnify the Trust for the settlement with Matusak for the reasons stated on the record and denied Brigade Fire's motion.

Brigade Fire then appealed the trial court's opinion and order to this Court.²

II. INDEMNIFICATION

A. STANDARDS OF REVIEW

Brigade Fire argues on appeal that the trial court erred when it granted summary disposition in favor of the Trust on the Trust's indemnification claim. Specifically, Brigade Fire notes that the indemnification clause only obligated it to indemnify the Trust for its own negligence and, because the trial court had already dismissed Matusak's claims against Brigade Fire, the Trust could not—as a matter of law—establish that Brigade Fire's negligence gave rise to its liability. This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews *de novo* the proper interpretation and application of a contract. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 Nw2d 840 (2001).

B. ANALYSIS

Brigade Fire executed a subcontractor agreement with Houseman Construction in November 2007. In paragraph 12 of the agreement, Brigade Fire agreed to:

defend, indemnify and hold harmless Houseman, Houseman's officers, employees, representative, agents, other subcontractors, architects, engineers, [the Trust] and their agents, consultants, [and] employees from and against all claims, damages, losses, demands, liens, payments, suits, actions, recoveries, judgments,

² Matusak and Houseman Construction are not parties to this appeal.

and expenses, including attorneys' fees . . . which are made, brought or recovered against Houseman by reason of or resulting from, but not limited to, any injury, damage, loss or occurrence arising out of or resulting from the performance or execution of this Agreement and cause[d], in whole or in part, by the act, omission, fault, negligence or breach of this Agreement by [Brigade Fire]

An agreement to indemnify is lawful and enforceable. See *Grand Trunk W R R, Inc v Auto Warehousing Co*, 262 Mich App 345, 351; 686 NW2d 756 (2004). The duty to indemnify is determined from the language of the contract. *Id.* at 353.

Brigade Fire agreed to indemnify the Trust for expenses that arose from its performance under the agreement that were caused “in whole or in part,” by Brigade Fire’s “act, omission, fault, negligence or breach of” the agreement. When the terms act, omission, fault, negligence, and breach are read together, it is plain that Brigade Fire would only be liable to indemnify the Trust for its acts or omissions that involve some degree of culpability. Accordingly, because the indemnification involved compensation for the expenses related to Matusak’s suit, the Trust had to establish that Brigade Fire was responsible in whole or in part for Matusak’s fall. Here, the undisputed evidence showed that the trial court had dismissed Matusak’s claims against Brigade Fire before the Trust agreed to settle with Matusak. Moreover, Matusak did not appeal that decision. The Trust could not, for that reason, establish that Brigade Fire was liable for Matusak’s fall. Accordingly, the Trust failed to establish facts that triggered the indemnification clause.

For the same reason, even if we were to conclude that the Trust had established the indemnification clause’s applicability, we would nevertheless conclude that Brigade Fire could not be liable under that clause because the Trust’s decision to settle with Matusak was unreasonable as a matter of law.

[I]f an indemnitee settles a claim against it before seeking the approval of, or tendering the defense to, the indemnitor, then the indemnitee must prove its *actual* liability to the claimant to recover from the indemnitor. However, the indemnitee who has settled a claim need show only *potential* liability if the indemnitor had notice of the claim and refused to defend. [*Id.* at 354-355 (citations omitted).]

Potential liability refers to the reasonableness of the decision to settle. *Ford v Clark Equipment Co*, 87 Mich App 270, 278; 274 NW2d 33 (1978), rejected not in relevant part by *Grand Trunk W R*, 262 Mich App at 358-359. When determining whether the decision to settle was reasonable, a potential fact-finder “must look at the amount paid in settlement of the claim” in light of the “probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed.” *Id.*

As already explained, Brigade Fire had an *absolute* defense to Matusak’s claims; that is, because Brigade Fire presented evidence that Matusak could not have prevailed in her claims against it, no reasonable jury could have found that the Trust’s decision to settle—at least with regard to any potential liability arising from Brigade Fire’s acts or omissions—was reasonable. For these reasons, the trial court erred when it granted summary disposition in the Trust’s favor.

The trial court should have denied the Trust's motion and granted Brigade Fire's motion for summary disposition.

C. CONCLUSION

The Trust failed to present evidence that Brigade Fire's actions or omissions triggered the indemnification clause and, in any event, Brigade Fire established that it had an absolute defense to Matusak's claims, which made it unreasonable for the Trust to settle the claims. For that reason, the trial court erred when it granted summary disposition in the Trust's favor and denied Brigade Fire's motion for summary disposition. Accordingly, we reverse the trial court's decision to grant summary disposition in the Trust's favor, vacate its order to that effect, and remand for entry of an order dismissing the Trust's indemnification claim against Brigade Fire.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Brigade Fire may tax its costs. MCR 7.219(A).

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly