

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4040-13T1

TOYS "R" US, INC.,

Plaintiff-Respondent/
Cross-Appellant,

v.

SCHIMENTI CONSTRUCTION COMPANY, L.L.C.,

Defendant-Respondent/
Cross-Appellant,

and

SNS ARCHITECTS AND ENGINEERS, P.C. and
ATLAS PAVING CONTRACTORS, INC.,

Defendants.

SCHIMENTI CONSTRUCTION COMPANY, L.L.C.,

Third-Party Plaintiff,

v.

BENFATTO CONSTRUCTION CORP.; HACKENSACK
STEEL CORP.; SNS ARCHITECTS AND ENGINEERS,
P.C.; ATLAS PAVING CONTRACTORS, INC.;
and KJC, INC. d/b/a KJC WATERPROOFING, INC.,

Third-Party Defendants,

and

INDUSTRIAL CONCRETE CONSTRUCTION OF NJ, INC.,

Third-Party Defendant-
Appellant/Cross-Respondent.

Submitted November 9, 2015 – Decided December 4, 2015

Before Judges Fasciale and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Docket No. L-
3468-09.

Mayfield Turner O'Mara & Donnelly, P.C.,
attorneys for appellant/cross-respondent
(Francis X. Donnelly, on the briefs).

Peckar & Abramson, P.C., attorneys for
respondents/cross-appellants (Bruce D.
Meller, of counsel; Peter E. Moran, on the
briefs).

PER CURIAM

Industrial Concrete Construction of New Jersey (ICC) appeals from a March 28, 2014 order and amended final judgment (the judgment) entered after a bench trial awarding damages in favor of Toys "R" Us (TRU) and Schimenti Construction Company (SCC) (collectively TRU/SCC). TRU/SCC cross-appeals from the judgment denying prejudgment interest. We affirm on the appeal and remand for findings of fact and conclusions of law as to the entry of prejudgment interest.

This is a construction defect case. The owner of the property (TRU) hired a general contractor (SCC) to construct a new building (the project) as part of its headquarters. SCC subcontracted the concrete work to ICC.

TRU entered into a liquidating and settlement agreement (the agreement) with SCC and various subcontractors other than

ICC before the bench trial commenced.¹ In the agreement, SCC admitted liability for all construction defects on the project, agreed to pay TRU \$150,000 representing a partial satisfaction of SCC's liability, and assigned to TRU its remaining third-party claims seeking indemnification and contribution against ICC.

The judge conducted the bench trial over five days in December 2013, and rendered a written opinion dated February 21, 2014. In his opinion, the judge found that ICC used inferior concrete and otherwise failed to provide topping sealant and expansion joints. He awarded TRU/SCC \$345,560 in damages as a result of ICC's substandard work.

The judge declined to enter prejudgment interest concluding that "ICC's non-payment was not unreasonable based upon the legal and factual issues presented pre-trial and at trial." TRU/SCC moved for counsel fees and costs, which the judge granted. The judge awarded TRU/SCC an additional \$244,263, added that amount to TRU/SCC's recovery, and entered an amended final judgment in the amount of \$589,823.

On appeal, ICC argues that the judge erred by (1) entering a judgment against it for more than the amount SCC paid TRU

¹ The other subcontractors and parties were dismissed from this case prior to trial.

pursuant to the agreement; (2) failing to allocate liability against the settling parties; and (3) awarding counsel fees.

I.

We begin by addressing ICC's first contention that the judge erred by entering the final judgment in an amount greater than the amount SCC paid to TRU. ICC maintains that the judge should have limited its liability exposure to the amount SCC paid TRU under the agreement. In other words, ICC contends that the judge erred as a matter of law.

In entering the judgment, the judge considered the language of the agreement, which states in pertinent part that

2. [SCC] acknowledges that as a result of the terms of the [g]eneral [c]ontract, it is liable to TRU for all [c]onstruction [d]efects, [c]onstruction [d]efect [d]amages and [p]revailing [p]arty [d]amages, notwithstanding that the work which constitutes the [c]onstruction [d]efects was performed by its subcontractors . . . and that these subcontractors are responsible pursuant to their subcontracts to [SCC] for the proper performance of their work to the same extent that [SCC] is responsible to TRU. Accordingly, [SCC] admits liability to TRU for all [c]onstruction [d]efect [d]amages incurred by virtue of [c]onstruction [d]efects and [p]revailing [p]arty [d]amages. [SCC] shall liquidate and fully satisfy this liability pursuant to the provisions of paragraphs [three] and [four] of this [agreement].

3. In partial satisfaction of [TRU's claims against SCC] and in full and complete satisfaction of [SCC]'s other liability to

TRU for any and all claims relating to the [p]roject including the [c]onstruction [d]efect [d]amages and [p]revailing [p]arty [d]amages, [SCC] shall:

(a) Pay to TRU the total sum of [\$395,000] in the following manner:

(i) The sum of [\$150,000]; and

(ii) The sum of [\$245,000] from the funds of [another subcontractor] which shall be paid directly to TRU and which satisfies only that portion of the [c]onstruction [d]efect [d]amages arising from the masonry work performed by [the other subcontractor], which [the other subcontractor] agrees to pay to TRU.

4. In addition to the payments provided by [p]aragraph [three] and in further consideration of the [agreement], [SCC] will prosecute the [SCC] claims, which includes its liability for [c]onstruction [d]efect [d]amages and [p]revailing [p]arty [d]amages against . . . [ICC]. TRU will control the prosecution of the [SCC] claims and shall be solely responsible for all associated litigation

[(Emphasis added).]

We owe no deference to the judge's interpretation of the contract between the parties and the legal consequences that flow therefrom. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

A contract must be given its plain and ordinary meaning. Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div.

2002). The language of the agreement demonstrates that TRU and SCC did not intend to limit TRU's recovery on SCC's claims against ICC. The amount SCC paid TRU was in "partial satisfaction" of TRU's claims against SCC. SCC's assignment to TRU of its claims against ICC further illustrates that SCC and TRU did not intend to limit TRU's recovery to the amount SCC paid TRU pursuant to the agreement.

The agreement essentially amounted to what has been described as a pass-through claim. New Jersey courts, beginning with Buckley & Co. v. State, 140 N.J. Super. 289 (Law Div. 1975), have recognized the validity of liquidating agreements. As one New York court explained, there are three basic elements inherent in a liquidating agreement:

(1) the imposition of liability upon a party for a third party's increased costs, thereby providing the first party with a basis for legal action against the party at fault, (2) a liquidation of liability in the amount of the first party's recovery against the party at fault, and (3) a provision for the pass-through of that recovery to the third party.

[N. Moore St. Developers, LLC v. Meltzer/Mandl Architects, P.C., 799 N.Y.S.2d 485, 489 (App. Div. 2005).]

Here, the agreement met all three elements. First, SCC admitted liability to TRU for damages relating to the "[c]onstruction [d]efects and [p]revailing [p]arty [d]amages." Second, SCC agreed to "liquidate and fully satisfy" its liability pursuant

to the provisions set forth in paragraphs three and four of the agreement. In sum, SCC admitted liability and agreed to pay a fixed amount up front and distribute the proceeds of the third-party claims to TRU, satisfying elements one and two.

Finally, there was a provision for the "pass-through" of SCC's recovery on the third-party claims to a third-party, namely TRU. Whatever SCC recovered from those third-party claims would be passed-through to TRU, the party that lacks privity of contract with the subcontractors. Thus, this agreement meets all of the elements of a proper liquidating agreement.

Instead of TRU pursuing its claims directly against SCC related to damages caused by ICC's improper concrete work, and then SCC seeking indemnification and contribution against ICC for SCC's liability exposure to TRU, SCC assigned to TRU its claim against ICC. TRU and SCC deliberately left open TRU's ability to collect additional damages against ICC because SCC only paid TRU for "partial satisfaction" of SCC's liability exposure to TRU.

II.

We reject ICC's contention that the judge erred by failing to allocate a percentage of fault to the settling parties. ICC maintains that the judge erred by not including the architect

and SCC on the verdict sheet. ICC argues, therefore, that the judge violated the Comparative Negligence Act, N.J.S.A. 2A:15-5.2.

We note generally that "[t]he Joint Tortfeasors Contribution Law is . . . designed to 'alleviate the evident harshness and inequity of the common-law rule . . . pursuant to which there was no right of joint tortfeasors to seek allocation among themselves of the burden of their fault.'" Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 303 (App. Div. 2001) (second alteration in original) (quoting Markey v. Skog, 129 N.J. Super. 192, 199 (Law Div. 1974)). "The purpose of the Joint Tortfeasors Contribution Law is 'to promote fair sharing of the burden of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim.'" Ibid. (quoting Holloway v. State, 125 N.J. 386, 40[0-01] (1991)). The Comparative Negligence Act modified the Joint Tortfeasors Contribution Law so that "[j]oint tortfeasors no longer share liability on a pro rata basis, but instead on the basis of percentages of fault assigned by the trier of fact." Blazovic v. Andrich, 124 N.J. 90, 105 (1991).

Here, allocation as suggested by ICC is of no moment because the judge found ICC solely liable for ICC's poor workmanship. At trial, TRU/SCC sought compensatory damages from

ICC for concrete masonry repairs and waterproofing for the parapet walls and concrete parking deck. TRU/SCC maintained at trial that such damages were caused by ICC.

As to the parapet walls, the judge rejected TRU/SCC's contention that ICC caused damage to the parapet walls and roofing membrane. As a result, the judge denied TRU/SCC's claim against ICC for waterproofing and repairs to the walls. As to the concrete construction deficiencies, the judge found that ICC solely caused compensatory damages due to ICC's deficient concrete workmanship. Thus, there is no reason to allocate damages attributable to the architect or SCC.

III.

Finally, we reject ICC's argument that the judge erred by awarding counsel fees and costs to TRU/SCC.

"[F]ee determinations by trial courts will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). We award attorney's fees only where "expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001).

Here, TRU/SCC is entitled to fees pursuant to contract. Paragraph five of SCC's subcontract agreement with ICC states that

[t]o the fullest extent permitted by law [ICC] shall defend, indemnify and hold [SCC], [TRU], and the agents and employees of the foregoing harmless, of and from any and all claims, suits, losses or expenses whether direct or consequential (including legal fees and other expenses of litigation) arising out of or in consequence of the performance of this [p]urchase [o]rder[.]

Paragraph eighteen of the agreement states that ICC is "liable for all direct and consequential damages arising out of . . . this [p]urchase [o]rder. Any claim against [ICC] for breach of this [p]urchase [o]rder may be asserted by [SCC] or by [TRU] directly."

The judge found that TRU was the prevailing party and that the construction contract between TRU and SCC had a prevailing party provision, allowing TRU to recover costs and expenses, as well as attorneys' fees. Section 10.4 of the contract between TRU and SCC states that

[i]n the event either party to [the construction contract] shall institute any claim, suit, action or other proceeding involving the other party hereto, then the party prevailing in such claim, suit, action or other proceeding shall be entitled to recover and receive from the non-prevailing party all costs and expenses (including attorneys' fees) actually incurred by the prevailing party in prosecuting or defending, as the case may be, its interest in such claim, suit, action or other proceeding. Such recovery shall be in addition to and not in limitation of any other relief to which the prevailing party

may be entitled in such claim, suit, action
or other proceeding.

The judge properly recognized that TRU was "entitled to fees [as a prevailing party] based on a reasonable ratio to be established by the [c]ourt" Once it is determined that the party is "prevailing," the "next step in determining the amount of the award is to calculate the 'lodestar,' which is that number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009). Here, the judge determined that TRU/SCC's fees were reasonable.

ICC is correct that as a general rule, parties are expected to bear their own costs and that fee shifting is generally disfavored. N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999). However, it is well established that parties may contract to shift costs and attorneys' fees, as ICC did here. Id. at 570. It is undisputed that ICC contracted with SCC to indemnify SCC for attorneys' fees and costs.

Had TRU not entered into the agreement with SCC, TRU would have proceeded on its direct claim against SCC. TRU's contract with SCC contained a prevailing party clause. TRU would have been entitled to counsel fees from SCC in that instance. SCC would then have had a contractual right to seek fees from ICC on

its third-party complaint. SCC's agreement with ICC explicitly stated that ICC would indemnify SCC "from any and all claims, suits, losses or expenses whether direct or consequential (including legal fees and other expenses of litigation) arising out of or in consequence of the performance of this [p]urchase [o]rder[.]" The agreement streamlined the litigation when SCC assigned to TRU its rights seeking indemnification and contribution against ICC. Along with this assignment came TRU's right to seek from ICC attorneys' fees and costs as a prevailing party.

IV.

On the cross-appeal, TRU/SCC argues that the judge erred by declining to award prejudgment interest. The judge declined to award prejudgment interest, determining that "ICC's non-payment was not unreasonable based upon the legal and factual issues presented pre-trial and at trial." We conclude that the judge did not sufficiently comply with Rule 1:7-4(a).

The trial judge's obligation to fully explain his or her ruling is clear:

In support of an order . . . , a judge is required to detail the findings of fact and conclusions of law in a written or oral opinion. R. 1:7-4(a); R. 4:46-2(c). A motion judge is obligated "to set forth factual findings and correlate them to legal conclusions. . . . Neither the parties nor the appellate court is "well-served by an

opinion devoid of analysis or citation to even a single case." Ibid.

[Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 299-300 (App. Div. 2009) (citations omitted).]

The rule "requires specific findings of fact and conclusions of law" Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 1:7-4 (2015). On this record, we are unable to address whether the judge abused his discretion by refusing to include prejudgment interest, and we therefore remand, directing the judge to make sufficient findings of fact and conclusions of law.

Affirm on the appeal and remand on the cross-appeal for full compliance with Rule 1:7-4(a). We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION