SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2188-15T4

BRUNNQUELL IRON WORKS, INC.,

Plaintiff-Respondent,

v.

CHESTERFIELD BOARD OF EDUCATION,

Defendant/Third-Party
Plaintiff-Appellant,

v.

NJSBA INSURANCE GROUP,

Third-Party Defendant.

Submitted September 11, 2017 – Decided February 16, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1896-12.

Barnaba & Marconi, LLP, attorneys for appellant (Dennis M. Marconi and Tyler L. Williams, on the briefs).

Bolan Jahnsen Dacey, attorneys for respondent (Terrence J. Bolan, on the brief).

PER CURIAM

A fire at the construction site of a new elementary school caused the Chesterfield Board of Education to incur direct losses to the building, and loss of use and consequential damages. The Board blamed the fire on the negligence of its contractor, Brunnquell Iron Works, and sought from Brunnquell the damages it was unable to recover from its insurers. Brunnquell successfully argued the Board's claim was barred by the contract between Brunnquell and the Board — specifically, the American Institute of Architects (AIA) General Conditions of the Contract for Construction, AIA Document A201/CMa — 1992. The Board now appeals from the trial court's order granting Brunnquell summary judgment. We affirm.

When reviewing a grant of summary judgment, we employ the same standard as the motion judge under Rule 4:46-2(c). Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We consider whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

For purposes of Brunnquell's motion, the amount of the Board's losses and what caused them, are not material. We assume, as the

Board alleged, that negligent welding and trimming operations by Brunnquell caused the fire. We also assume the Board suffered various forms of consequential and loss of use damages as a result of the fire. These consisted of: "hard costs" — above-normal expenses incurred to expedite the installation of ductwork and electrical work; additional construction management and architectural fees, to keep the project moving; delay claims by contractors, for extra time they had to remain on site; and expenses incurred to move students into temporary locations. Furthermore, we assume that the Board's insurers did not fully indemnify it for these losses.[1]

The issues before us are legal. We must ascertain the meaning of relevant provisions of the AIA contract, and whether they shield Brunnquell from the Board's claims. We perform that task de novo. See Kieffer v. Best Buy, 205 N.J. 213, 222 (2011) (stating "[t]he interpretation of a contract is subject to de novo review by an appellate court").

[1] We need not explore the Board's claims against its insurers, Peerless Insurance, and the New Jersey School Boards Association Insurance Group. We note that the Board settled a claim against the latter, for significantly less than it sought, under its "extra expense extension" coverage. Regardless of whether all its losses were covered, the Board characterizes them before us as loss of use and consequential damages, for which, it argues, Brunnquell is responsible.

The AIA contract, at Article 11, sets forth the respective responsibilities of the Board as "Owner," and Brunnquell as "Contractor," to procure insurance against losses related to the construction project.[2] The provisions are designed to oblige the owner to procure insurance, up to the cost of the project itself, for the contractor's benefit as well as its own. See Justin Sweet, Sweet on Construction Industry Contracts: Major AIA Documents § 22.04[A], at 16 (2018) (stating this section requires owners to purchase and maintain property insurance "for the interests of the owner and all contractors, subcontractors, and sub-subcontractors"). If the owner fails to procure insurance, it is required to advise the contractor in writing, so the contractor can procure insurance and charge it to the owner; and if the owner fails to advise the contractor, then the owner shall bear all costs attributable to its failure.

Section 11.3.1 establishes the owner's obligation to insure for the benefit of itself and the contractor:

> [The Board] shall purchase and maintain . . . property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained . . . until final payment has been made . . . or until no

[2] Both parties assume that the Board is the "Owner" and Brunnquell is the "Contractor" as used in the contract.

> person or entity other than [the Board] has an insurable interest in the property required by this Section 11.3 to be covered, whichever is earlier. This insurance shall include interests of [the Board], [Brunnquell], Subcontractors, and Sub-subcontractors in the Work.

Section 11.3.1.1 describes the required coverage:

> Property insurance shall be on an "all-risk" policy form and shall insure against the perils of fire and extended coverage and physical loss or damage . . ., and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

Section 11.3.1.2 describes the owner's obligation to inform the contractor if it does not insure, and the consequences of not doing so:

> If [the Board] does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, [the Board] shall so inform [Brunnquell] in writing prior to commencement of the Work. [Brunnquell] may then effect insurance which will protect the interests of [Brunnquell], Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to [the Board]. If [Brunnquell] is damaged by the failure or neglect of [the Board] to purchase or maintain insurance as described above, without so notifying [Brunnquell], then [the Board] shall bear all reasonable costs properly attributable thereto.

Other courts that have analyzed identical or comparable AIA provisions agree that the contract is designed to impose an insurance obligation upon the owner, and to avoid the inefficiencies of double-coverage. See Nodaway Valley Bank v. E.L. Crawford Constr., Inc., 126 S.W.3d 820, 829 (Mo. Ct. App. 2004) (observing that an insurance procurement requirement is intended to relieve each party of liability, avoid both parties having to insure against the same risk, and shift the risk of fire to a single insurer); see also Ins. Co. of N. Am. v. E.L. Nezelek, Inc., 480 So.2d 1333, 1335 (Fla. Dist. Ct. App. 1985) (interpreting provision as "imposing an affirmative duty on the owner to purchase insurance for the benefit of the contractor"); Chadwick v. CSI, Ltd., 629 A.2d 820, 825-26 (N.H. 1993) (stating that "the insurance provisions of the standard AIA contract" are designed "to ensure that injuries or damage incurred during the construction project are covered by the appropriate types and limits of insurance, and that the costs of that coverage are appropriately allocated among the parties"); Jalapenos, LLC v. GRC Gen. Contractor, Inc., 939 A.2d 925, 931 (Pa. Super. Ct. 2007) (affirming dismissal of owner's action against contractor after construction fire, noting that owner was obliged to procure insurance, or advise contractor of its failure to do so).

The contract specifically shields the contractor from liability to the owner for loss of use and consequential losses caused by fire and other hazards. Instead, it leaves it to the owner to insure itself against such losses. Section 11.3.3, entitled "Loss of Use Insurance," states:

> [The Board], at [the Board's] option, may purchase and maintain such insurance as will insure [the Board] against loss of use of [the Board's] property due to fire or other hazards, however caused. [The Board] waives all rights of action against [Brunnquell] for loss of use of [the Board's] property, including consequential losses due to fire or other hazards however caused.

Other courts have relied upon this provision to shield contractors for delay damages and other consequential losses that the contractor allegedly caused. See Best Friends Pet Care, Inc. v. Design Learned, Inc., 823 A.2d 329, 339 (Conn. App. Ct. 2003) (noting, in case of construction fire that delayed completion of pet care facility, waiver provision shielded contractor from loss of use claims); Rosemount v. Lentin Lumber Co., 494 N.E.2d 592, 601 (Ill. App. Ct. 1986) (holding that under waiver provision, plaintiff owner accepted consequential damages from roof collapse in construction project); MU Chapter of the Sigma Pi Fraternity of the U.S., Inc. v. Northeast Constr. Servs., 709 N.Y.S.2d 677, 680 (App. Div. 2000) (holding that waiver precluded plaintiff from

seeking loss of use and consequential damages arising out of construction fire).

As the language of 11.3.3 is plain and unambiguous, we are obliged to give it effect. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014). Based on its clear terms, the Board waived any claim against Brunnquell for loss of use and consequential damages caused by fire – regardless of whether it was caused by Brunnquell's negligence. Instead, the contract obliged the Board to insure itself against such a loss.

We are unpersuaded by the Board's argument that the waiver in 11.3.3 is contingent upon the Board's purchase of insurance. There is simply no textual support for that interpretation. Under the contract's plain language, the Board's option to purchase insurance to insure itself against risk of loss of use is independent of its waiver of claims against others.[3]

[3] The Board's argument might have had greater force under a prior, 1976, version of the AIA contract, which expressly provided that the owner's waiver only extended to risks already covered by its own insurance. See Sweet on Construction Industry Contracts, § 22.04[I] at 51 (discussing 1976 version). However, the 1992 form that the parties used in this case is not so limited. Obviously, the drafters intended to adopt a broad waiver; they previously drafted a narrow one, but dropped it. Cf. Restatement (Second) of Contracts § 214(c) (1981) (stating that "[a]greements . . . prior to . . . the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing").

The Board also misplaces reliance on Brunnquell's own insurance obligation. Section 11.1.1.5 states:

> [Brunnquell] shall purchase . . . such insurance as will protect [Brunnquell] from claims . . . which may arise out of or result from [Brunnquell's] operations under the Contract and for which [Brunnquell] may be legally liable . . . [including] claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom . . . .

The provision also requires Brunnquell to purchase insurance for, among other things, workers compensation and bodily injury. The provision does not impose liability on Brunnquell to indemnify the Board. Rather, it requires Brunnquell to insure itself against claims, including "loss of use," "for which [it] may be legally liable." This provision does not contradict the Board's waiver of any loss of use or consequential damage claim against Brunnquell. See Chadwick, 629 A.2d at 826 (distinguishing between owner bearing "the risk of any loss of use of its property or for fire damage to its insured property," and risks borne by general contractor for claims of third parties for workers' compensation or personal injury).

The Board's claim also finds no support in the contract's waiver of subrogation provisions, section 11.3.7, which states:

> [The Board] and [Brunnquell] waive all rights against each other . . . for damages caused

> by fire or other perils to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work . . . . 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.

The Board correctly notes that the parties waived subrogation only of insured claims. However, we need not chart the precise boundaries of the coverage the Board was obliged to secure under section 11.3.1, or in fact did secure.[4] The non-waiver of subrogation of uncovered claims at most preserves any pre-existing right of action. Based on the waiver of loss of use and consequential damage claims in section 11.3.3, the Board had no right of action against Brunnquell for its losses.

Affirmed.

[4] Before the trial court, the parties disputed the scope of the Board's insurance obligation, and whether its claims against Brunnquell were "covered," notwithstanding the Board's settlement with its insurer. We need not resolve that dispute.