

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002352-MR

STEWART SERVICES, INC.

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 98-CI-00556

CENTEX RODGERS CONSTRUCTION COMPANY;
BAPTIST HEALTHCARE SYSTEM, INC.,
D/B/A WESTERN BAPTIST HOSPITAL; AND
TILFORD MECHANICAL CONTRACTORS, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Stewart Services, Inc. ("Stewart"), seeks review of a summary judgment of the McCracken Circuit Court concluding that the provisions in a subcontract prohibited Stewart from any recovery against the Appellees, Centex Rodgers Construction Company ("Centex") or Baptist Healthcare System,

Inc., d/b/a Western Baptist ("Western Baptist"). Finding no error, we affirm.

On October 26, 1995, Centex entered into a contract with Western Baptist to perform construction management services on an expansion project. On January 3, 1996, Centex entered into a subcontract with Stewart to perform installation of the project's mechanical, plumbing and fire protection systems, ("the sub-contract"). On January 26, 1996, Stewart entered into a "sub-subcontract" with Appellee, Tilford Mechanical Contractors, to perform a portion of that work.

On April 21, 1997, Tilford filed a claim with the American Arbitration Association (AAA) in Louisville, Kentucky, to resolve a dispute with Stewart over the costs of extra work it had performed on the project. On July 25, 1997, Stewart filed a motion in the Jefferson Circuit Court to stay the arbitration proceedings which was ultimately granted. An appeal followed.

On June 19, 1998, Tilford filed a complaint against Stewart in the McCracken Circuit Court. On October 9, 1998, Stewart filed a third-party complaint against Centex and Western Baptist, claiming entitlement to a judgment "by way of indemnity for any damages alleged by Tilford which resulted from the actions or inactions of those two parties." Alternatively, Stewart claimed that it was entitled to "an apportionment of

damages claimed by Tilford to the extent that said damages may have resulted from the action or inactions of those two parties."

By Opinion rendered March 25, 1999, another panel of this Court held that the Jefferson Circuit Court had erred in ordering a stay of arbitration, and vacated that order and remanded. By order entered November 10, 1999, the Supreme Court denied a motion for discretionary review.

On May 12, 2000, the McCracken Circuit Court entered an order granting Tilford's motion to stay the within action, pending the outcome of the arbitration between Tilford and Stewart. On November 30, 2000, the AAA entered an award, providing in pertinent part:

1. We hereby find in favor of Tilford against Stewart for Stewart's breach of contract for its own conduct, the conduct of Centex-Rodgers Construction Company, and the implied warranties furnished with the contract documents, plans and specifications for the additions and renovations to the Western Baptist Hospital of Paduca, [sic] Kentucky.
2. We hereby award to Tilford damages, including prejudgment interest, totaling \$1,005,894.37.
3. Because of the pass-thru nature of certain claims for which Stewart may be entitled to indemnification, we have provided a breakdown of the award. . . .

On January 18, 2001, Tilford moved to confirm the award. On January 29, 2001, Western Baptist filed a response and cross-motion to lift the stay, contending that the court "should limit its order confirming the [arbitration] award to provide that . . . [it] is not binding upon Western Baptist because Western Baptist was not a party to the AAA proceeding." On February 6, 2001, Stewart filed a response to Tilford's motion. Stewart maintained that the motion should have been filed in Jefferson Circuit Court; further, that it was premature, because Stewart had a pending motion, in the Jefferson Circuit Court action, to vacate the arbitration award. On February 8, 2001, Centex filed a response, stating that it was "neutral" with respect to the confirmation of the AAA award, requesting only that the court take "judicial notice" that the award had no collateral estoppel effect upon Centex and Western Baptist, because they were not parties to the arbitration.

On February 27, 2001, the court entered an order lifting the stay for the limited purpose of considering the pending motions for summary judgment previously filed by Centex and Western Baptist; the court also entered an order denying Tilford's motion to confirm the arbitration award, for the reasons stated in Stewart's response.

On July 23, 2001, the trial court entered an order granting summary judgment in favor of Centex and Western

Baptist. The court found "that the provisions of the parties' contract prohibit recovery by Stewart from Centex or Western Baptist Hospital for any allegations in the lawsuit." On October 2, 2001, the court denied Stewart's motion to alter, amend or vacate. On October 26, 2001, Stewart timely filed a notice of appeal.

The standard of review is whether the trial court correctly determined no genuine issues of material fact exists, and that the movant was entitled to judgment as a matter of law.¹

Stewart first asserts that it has a valid common law indemnity claim against Centex and Western Baptist, notwithstanding the express indemnity provisions of the subcontract, in reliance upon *Thompson v. Budd Company*.²

Thompson is distinguishable on its facts. Thompson worked for Merrick. Merrick contracted with the Budd Company to maintain its HVAC system. While working for Merrick at Budd's plant, Thompson was injured in a fall. Thompson filed a negligence claim against the Budd Company, Barton, who constructed the facility, and Kahn, who provided engineering and consulting services to Barton. Budd filed cross-claims against Merrick, Barton and Kahn.

¹ *Scifres v. Kraft*, Ky. App., 916 S.W.2d 779, 781 (1996).

² 199 F.3d 799 (6th Cir. 1999).

The district court held that the Kentucky Workers' Compensation law immunized the Budd Company from Thompson's common law tort claims. Reasoning that without liability there could be no indemnity, the district court dismissed all claims.

On appeal, the Sixth Circuit explained that Kentucky law distinguishes common law and contractual indemnity. Liability is a prerequisite to common law indemnity; whereas, "the nature of an indemnitor's liability under an indemnity contract shall be determined by the provisions of the indemnity agreement itself."³ In that respect, the court treated the claims separately.

The court held that Budd's common law indemnity claim must fail, because Budd was not liable to Thompson, by virtue of the Kentucky Workers' Compensation law. Insofar as the contractual indemnity claims, the issue was whether Budd had contracted for indemnification for its legal expenses in defending the suit by Thompson, irrespective of Budd's liability. *Thompson* does not hold that a common law indemnity claim may be pursued separately, where an indemnitor's liability is governed by express contractual agreement.

Here, Centex and Western Baptist assert that Stewart's liability is governed by the express provisions of Section 7

³ *Id.* at 807, citing *United States Fidelity & Guar. Co. v. Napier Elec. & Constr. Co., Inc.*, Ky.App., 571 S.W.2d 644, 646 (1978).

B(2) of the subcontract, which bars any common law indemnity claim. We agree. Section 7 B(2), under the heading, "Indemnification," provides:

Subcontractor [Stewart] hereby agrees to defend and indemnify, protect and hold harmless Contractor [Centex] and/or Owner [Western Baptist] of and from any loss or damage and to reimburse Contractor [Centex] and/or Owner [Western Baptist] for any and all expenses, including legal fees, expert witness fees and other litigation costs to which Contractor [Centex] and/or Owner [Western Baptist] may be put because of:

. . .

(2) the liability for claims and liens for labor performed or materials used or furnished through or under Subcontractor [Stewart] for the project.

Stewart argues that Centex and Western Baptist have misconstrued the "plain and clear intent" of this provision -- to protect them from having mechanic's liens or other claims asserted directly against them *as a result of Stewart's failure to pay its subcontractors*. Stewart argues that the provision does not indemnify Centex and Western Baptist from liability for their own acts, because such an intention must be clearly manifest, citing *Employers Mutual Liability Insurance Co. of Wisconsin v. Griffin Construction Co.*⁴

The language of Section 7 B(2) of the subcontract is broad and plain. Stewart has agreed to defend and indemnify,

⁴ Ky. App., 280 S.W.2d 179, 183 (1945).

protect and hold harmless, Centex and Western Baptist of and from *any loss or damage* because of *the liability for claims* for labor performed under Stewart for the project. Section 7B(2) does not state that Stewart's duty to indemnify is limited to claims resulting from a failure to pay its subcontractors. We cannot insert words into the contract that the parties have not used.

It is true that when there is a doubt as to the meaning of an indemnity clause the construction should be against the contention that the contract was meant to indemnify against an indemnitee's own negligence. We have said that every presumption is against such intention. [citation omitted]. But such clauses are not against public policy and in cases where it is not improbable that a party would undertake such an indemnification of another party we reach a different result. [citations omitted].

In the case at hand the contractor was to indemnify the owner against "* * * all claims, demands, liens, taxes, loss, or damages of any character * * *." Unless there was required specifically the statement "including the owner's own negligence," we can hardly envision a more inclusive indemnity provision.⁵

We conclude that the express indemnity provisions of the contract govern the relationship of the parties, and preclude any recovery by Stewart against Centex and Western Baptist. "[T]here can be no implied contract or presumed agreement where there is an express one between the parties in reference to the same subject matter. If there is an express

⁵ *Fosson v. Ashland Oil, Ky.*, 309 S.W.2d 176, 178 (1957).

written contract covering the transaction, its terms are controlling and parties are bound by them."⁶

We cannot agree with Stewart that Section 13E⁷ of the subcontract expressly reserved any rights and remedies it had at common law, where such an interpretation would render Section 7 B(2) of the subcontract meaningless.⁸

In light of our decision herein, we do not reach the remaining issues Stewart has raised on appeal. We note that Centex has argued Stewart is obligated to pay for its attorney fees, expenses and costs under Section 14A of the contract. We agree with Stewart that the issue was not properly preserved, because Centex raised this issue in its motion for summary judgment, the trial court failed to address it, and Centex failed to file a cross-appeal.⁹

⁶ *Fruit Growers Exp. Co. v. Citizens Ice & Fuel*, 271 Ky. 330, 112 S.W.2d 54, 56 (1937).

⁷ Section 13E, entitled "Remedies Cumulative," provides:
No right or remedy in the Subcontract is intended to be exclusive of any other right or remedy, but every such right or remedy shall be cumulative and shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.

⁸ *L.K. Comstock & Co., Inc v. Becon Construction Co.*, 932 F.Supp. 948, 967 (E.D.Ky. 1994), quoting Restatement (Second) of Contracts, Section 203(c),(d) (1979).

⁹ See *Commonwealth, Transportation Cabinet, Department of Highways v. Taub*, Ky., 766 S.W.2d 49 (1988).

We affirm the summary judgment of the McCracken
Circuit Court.

ALL CONCUR.

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