HENSEL PHELPS CONSTRUCTION CO., Cross-complainant and Appellant,
v.
URATA & SONS CEMENT, INC., Cross-defendant and Respondent.
C059042
COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT (Sacramento)
Dated: January 9, 2012
NOT TO BE PUBLISHED

(Super. Ct. No. 04AS03070)

The trial court determined cross-defendant subcontractor did not have a duty to defend cross-complainant general contractor against a construction defect complaint. We agree with the trial court. The contract between the general contractor and the subcontractor did not require the latter to defend the former until the latter's liability was established -- a finding that was never made. We affirm the trial court's judgment.

FACTS

The owners of a Sacramento high-rise sued the building's general contractor, Hensel Phelps Construction Co. (Hensel Phelps), for construction defects. The complaint alleged Hensel Phelps was negligent for reinforcing the concrete slabs used in the building's parking garage with fiber mesh instead of welded steel wire mesh. The slabs were beginning to fail.

Hensel Phelps filed a cross-complaint for indemnity against its subcontractors who performed the cement work on the parking garage, including Urata & Sons Cement, Inc. (Urata). Hensel Phelps tendered its defense to Urata and the other subcontractors, but they refused.

Following the owners' presentation of evidence at trial, the trial court determined the complaint was barred by the statute of limitations. The owners appealed, but they ultimately abandoned their appeal.

Trial proceeded on Hensel Phelps's cross-complaint, which now sought only to enforce a duty to defend imposed by the subcontracts' indemnity provisions. Following Hensel Phelps's case-in-chief, the subcontractors filed a motion for judgment against the cross-complaint pursuant to Code of Civil Procedure section 631.8.[1] They argued they owed no duty under their subcontracts to defend Hensel Phelps against the owners' complaint. Of particular relevance here, Urata argued that a handwritten interlineation on its subcontract required Hensel Phelps to prove Urata was at fault for the injury alleged in the building owners' complaint before Urata was obligated to defend Hensel Phelps in that action.

The trial court agreed with the subcontractors and granted the motions for judgment against Hensel Phelps's cross-complaint, concluding the subcontractors owed no duty to defend Hensel Phelps against the building owners' complaint. The court in its written ruling did not discuss the handwritten interlineation in Urata's subcontract. Instead, it noted that all of the subcontracts provided that Hensel Phelps could recover its attorney fees whether the allegations in the complaint against it were "'valid or not.'"

The court interpreted the subcontracts' indemnity clauses to impose a duty to defend if the owners' complaint alleged, or the evidence at trial established, that the owners' damages arose out of the work performed by the subcontractors. It concluded the complaint's allegations did not expressly allege that the owners' damages arose from the subcontractors' work and thus did not trigger the subcontractors' duties to defend. The court determined the complaint alleged only design defects intentionally wrought by Hensel Phelps and others not party to this action.

The trial court also concluded, based on the evidence the owners had presented in their trial, that the concrete failure did not as a matter of fact arise out of the subcontractors' work, but rather resulted from the decision to use fiber mesh in place of welded steel wire mesh in the concrete decks. Because that decision was outside the scope of the subcontractors' work, the subcontractors' duties to defend had not been triggered.

Hensel Phelps filed a motion for new trial, but the court denied the motion. The court awarded prevailing party attorney fees to the subcontractors pursuant to the terms of the subcontracts.

Hensel Phelps appeals from the judgment on the cross-complaint and from the award of attorney fees. Because Hensel Phelps has settled its claims with the other subcontractors, the only subcontractor remaining in this appeal is Urata. Resolving this appeal turns on the meaning and effect of the handwritten interlineation in the Urata subcontract. Hensel Phelps concedes Urata was not found to be at fault at trial. Thus, if the interlineation validly conditioned Urata's duty to defend upon a finding of fault by Urata, we must affirm the judgment.

DISCUSSION

The indemnity clause in Urata's subcontract containing the handwritten interlineation, which is italicized here, reads in relevant part as follows: "The subcontractor [Urata] expressly agrees, to the extent he is at fault[,] to save and hold harmless, indemnify and defend the contractor [Hensel Phelps] . . . from and against any and all liability, claims, losses, damages, causes of action, costs and expenses, including attorney's fees, arising or allegedly arising from . . .property damage, including loss of use thereof, economic loss, or otherwise, arising or growing out of the work performed by the subcontractor . . . , including any claim or liability arising from any act, error, omission, or negligence of the contractor occurring concurrently with that of the subcontractor or contributing to any loss indemnified hereunder, except for the sole negligence or willful misconduct of the contractor. . . ."

The Urata subcontract also stated, "In the event subcontractor refuses to assume the defense of a claim or action indemnified hereunder, such expenses and costs of attorney's fees shall be recovered whether such claims or allegations were valid or not."

There is a conflict in this indemnity provision's language. By means of using the interlineation, Urata attempted to limit its indemnity and defense exposure to only those claims on which and to the extent it is found to be at fault. Yet, Urata also agreed to pay attorney fees on indemnified claims it refused to defend whether such claims are "valid or not," or, in other words, on indemnified claims which it is not found to be at fault.

The parties offer different resolutions of this conflict. Urata argues that to the extent the provisions are inconsistent and cannot be reconciled, the handwritten terms prevail over the printed terms. (Civ. Code, § 1651; see also Code Civ. Proc, § 1862.) Urata also argues that its obligation to pay attorney fees for claims it refuses to defend is limited to claims that qualified for indemnity, and under the force of the interlineation, those would be only claims for which Urata is found to be at fault. Urata's proposed interpretation nullifies the language obligating Urata to pay attorney fees on claims falling within the scope of indemnity that are found not to be valid.

In opposition to Urata's interpretation, Hensel Phelps asserts that in order to harmonize and provide effect to all of the indemnity provisions, the interlineation limiting coverage to claims for which Urata is found to be at fault must be read to apply only to the obligation to indemnify. Otherwise, the language requiring payment of attorney fees for invalid claims is ignored and the duty to defend is rendered meaningless, converting it into only a duty of reimbursement.

Urata has the better argument. Under Civil Code section 1651, written parts of a contract control the printed parts, and "if the two are absolutely repugnant, the latter must be so far disregarded." The two provisions here setting forth the duty to defend are in absolute conflict. The handwritten provision conditions a duty to defend on a finding of fault, while the printed provision imposes a duty to defend with no finding of fault. We cannot harmonize one of these provisions without negating the other. In such a circumstance, the statute requires we enforce the handwritten provision at the expense of the printed one.

Also, Hensel Phelps's reading is grammatically infeasible as the contract is written. Its reading means the phrase,

"[t]he subcontractor expressly agrees, to the extent he is at fault[,] to save and hold harmless, indemnify and defend the contractor," means the condition precedent of fault applies only to the promise to indemnify, ignoring the handwritten interlineation's obvious modification of the duty to defend as well.

Moreover, if the handwritten interlineation refers only to the duty to indemnify, as Hensel Phelps argues, then the interlineation conflicts with another printed provision in the indemnity clause. That provision requires Urata to indemnify Hensel Phelps not just to the extent Urata is at fault, but also for any liability of Hensel Phelps that occurs

concurrently with or contributes to Urata's negligence. We resolve nothing by trading one conflict between contract terms for another.

We are not troubled that the parties agreed to limit the duty to defend to be only a duty of reimbursement. Although Civil Code section 2778 imposes on any contract of indemnity an obligation by the indemnitor to defend the indemnitee "in respect to the matters embraced by the indemnity" (id. at subd. 4), and to do so once the defense is presented (Crawford v. Weather Shield Mfg., Inc. (2008),44 Cal.4th 541), Civil Code section 2778 and Crawford also make clear that this statutory assumption can be altered by the parties. "Parties to an indemnity contract can easily disclaim any responsibility of the indemnitor for the indemnitee's defense, or the costs thereof. Short of that, they can specify that the indemnitor's sole defense obligation will be to reimburse the indemnitee for costs incurred by the latter in defending a particular claim." (Crawford v. Weather Shield Mfg., Inc., supra, 44 Cal.4th at p. 560.)

That is what the parties have done here. They modified the printed terms of the contract and the statutory assumption of Civil Code section 2778 by conditioning Urata's duty to defend upon a finding that Urata was at fault. In other words, the parties agreed that Urata would reimburse Hensel Phelps its attorney fees incurred in defending an action arising out of the contract's scope of work but only upon, and to the extent of, a finding that Urata was at fault.

Thus, to recover on its cross-complaint, Hensel Phelps must establish Urata was found to be at fault for the injuries alleged in the building owners' complaint. Hensel Phelps concedes there was no determination at trial that Urata was at fault for the defects in the parking garage. Indeed, the trial court granted an in limine motion preventing Hensel Phelps from presenting any evidence that Urata's conduct fell below the standard of care. Because it was never determined that Urata was at fault, Urata was not obligated to defend Hensel Phelps against the complaint.

This conclusion also justifies the trial court's award of prevailing party attorney fees to Urata.

DISPOSITION

The judgment and the award of attorney fees in favor of Urata are affirmed. Costs on appeal are awarded to Urata. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, J.

We concur:

RAYE, P. J.

BUTZ, J.

Notes:

[1.] Code of Civil Procedure section 631.8 provides that after a party has completed his presentation of evidence in a court trial, the other party may move for a judgment. The court, as trier of fact, weighs the evidence and may render a judgment in favor of the moving party at that time.
