IN THE TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

Lee Monte-Brewer,

Plaintiff,

vs. Court File No. 829-16

Bear Tracks, Inc.

Defendant.

MEMORANDUM AND ORDER

Summary

On November 19, 2018, the Court entered a Memorandum and Default Judgment in favor of Plaintiff Lee Monte-Brewer ("Monte-Brewer"), against Bear Tracks, Inc. ("Bear Tracks"), in the amount of $191,250. Thereafter, on December 21, 2018, Monte-Brewer filed a motion seeking an order adding his costs, expenses, interest, and attorney's fees to the principal amount of the Default Judgment. Memo. in Support of Mot. at 1-2. In support of his request for attorney's fees, Monte-Brewer cited an indemnification provision that appears in one of the six contracts he entered into with Bear Tracks on December 3, 2012, the document that was marked as Exhibit E in the default judgment hearing held on August 6, 2018, and that was referenced in paragraph 10 of Monte-Brewer's complaint.

In reviewing pertinent case law, the Court has concluded that the indemnification provision relied upon by Monte-Brewer is modeled on a standard provision in the American Institute of Architects (AIA) A201-2007 General Conditions of the Contract for Construction;

and the great weight of reported authority interpreting the scope of such provisions requires that a contractor must indemnify the owner for certain types of losses the owner incurs from third party claims. Claims asserted directly by an owner against a contractor for shoddy or improper work have consistently been held to not fall within the scope of theses indemnity provisions. The Court therefore must deny Monte-Brewer's motion.

Discussion

This Court has adopted the generally applicable American rule that parties to litigation normally must bear their own costs and fees. *Little Six Inc. v. Prescott and Johnson*, 1 Shak A.C. 157 (Feb. 1, 2000). But fees and costs can be awarded if a party's litigation efforts directly have brought benefit others, or if sanctions are appropriate because court orders have willfully been disobeyed, or if a party has acted vexatiously, wantonly, or for oppressive reasons. *Brooks v. Corwin*, 2 Shak. A.C. 5 (Aug. 4, 2008). The general rule also will not apply if there is specific authority, statutory or otherwise, authorizing or directing that attorney's fees should be awarded. *Shakopee Mdewakanton Sioiux (Dakota) Gaming Enterprise v. Prescott*, 2 Shak. A.C. 1 (Aug. 4, 2008).

Monte-Brewer's contention is that such specific authority exists here by virtue of an indemnification provision appearing in one of the six contracts that he entered into with Bear Tracks. The provision upon which he relies is commonly incorporated into construction contracts, and very closely mirrors the indemnification provision in the American Institute of Architects (AIA) A201-2007 General Conditions of the Contract for Construction. The following comparison of the most recent AIA indemnification provision to the one in the contract at issue here sets out, in strikeouts and bold type, the manner in which the parties' contract here tracks the AIA document:

AIA A201-2007 Indemnification Provision	**Section 7(a) of December 3, 2012 Contract** (differences from AIA provision noted, with ~~strikethrough~~ indicating deleted text and **bold** indicating added text)
§ 3.18.1. To the fullest extent permitted by	7. Indemnification. (a) To the fullest extent

law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.	permitted by law, the Contractor shall indemnify and hold harmless ~~the~~ Owner, ~~Architect, Architect's consultants, and agents and employees of any of them~~ from and against claims, damages, losses and expenses, including but not limited to attorneys' fees **related thereto or to the enforcement of this paragraph**, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property ~~(other than the Work itself)~~, but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. **Contractor agrees to obtain, maintain, and pay for such general liability coverage and endorsements (including product and completed operations coverage) as will insure the provisions of this Section.** ~~Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.~~

Because the provision upon which Monte-Brewer relies tracks the AIA provision so closely, case law interpreting the AIA provision clearly is useful in interpreting the effect of the provision here at issue; and the vast weight of that authority is to the effect that the indemnification contemplated by the provision does not include indemnification for losses resulting from construction defect claims brought directly by an owner against a contractor. Instead, the provision requires that the contractor indemnify the owner for losses, including attorney's fees, resulting from third party claims arising out of the contractor's negligence in performing the work.

The commentary published by the AIA, discussing the organization's model provision, specifically states that the AIA indemnification provision does not "cover a claim by the owner that the contractor has failed to construct the building according to the contract documents."[1] Relying on this guidance, the Superior Court of Connecticut recently dismissed a claim brought by an owner against a contractor for alleged failure to indemnify for losses stemming from the contractor's breach of contract.[2] The court reasoned that the AIA indemnification provision "required [contractor] to defend, hold harmless, and indemnify [owner] against *third*-party claims under defined circumstances."[3] The court added that "[t]here are no third-party claims asserted against [owner] and the duty to indemnify and hold harmless is not involved in the first-party claim by [owner] against [contractor]."[4]

Similarly, in *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, the California Court of Appeals overturned a trial court decision awarding $350,000 in attorney's fees in a dispute between owner and contractor under the standard AIA indemnification provision.[5] The court

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[1] AIA Document Commentary, A201-2007 General Conditions of the Contract for Construction, p. 19, *available at* http://aiad8.prod.acquia-sites.com/sites/default/files/2017-02/a201-2007%20commentary.pdf.

[2] *Forest Manor, LLC v. Travelers C & S Co.*, No. X06UWYCV156029923, 2018 WL 1146892, at *8 (Conn. Super. Ct. Jan. 30, 2018).

[3] *Id.*

[4] *Id.*

[5] 17 Cal. Rptr. 2d 242, 255 (Cal Ct. App. 1993). The clause at issue in *Myers* was as follows:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily

began with the general principle that "[a] clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons."[6] Turning to the language of the provision, the court explained that it was "a standard indemnity provision requiring [the contractor] to 'indemnify and hold harmless' [the owner] from third-party tort claims."[7] The court added that while "[a]ttorney's fees are included as losses or expenses recoverable under the indemnity agreement," the indemnity provision "is not a provision providing for an award of attorney's fees in an action to enforce the contract."[8] Accordingly, the court struck the award attorney's fees from the judgment.

Similarly, *Church Mut. Ins. Co. v. Palmer Const. Co.*, 153 F. App's 805, 808 (3d Cir. 2005) held that the "standard American Institute of Architects ('AIA') agreement" indemnification provision requires the contractor to "indemnify the [owner] if a claim is brought *against the [owner]* for a loss sustained as a result of [contractor's] performance of the work" (emphasis in original)). *Hunt Const. Grp., Inc. v. Hun Sch. of Princeton*, No. CIV.A. 08-3550, 2010 WL 3724279, at *14 (D.N.J. Sept. 16, 2010) concluded that AIA indemnification provision providing in part that "the Contractors shall indemnify and hold harmless the Owner . . . against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work" is a clause that "relate[s] to the reimbursement of expenses incurred in connection with defending *third-party* claims" (emphasis in original)). *Trung Mai v. Melchiori Const. Co.*, No. B211928, 2010 WL 3637577, at *9 (Cal. Ct. App. Sept. 21, 2010) held that "[u]nder the plain language" of the standard AIA indemnification provision, [contractor] agreed to indemnify [owner] for third party bodily injury and property damage claims . . . ."). And *Jalapenos, LLC v. GRC Gen. Contractor, Inc.*, 939 A.2d 925, 932 (Pa.

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injury, sickness, disease or death or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder . . . ."

Id. at 250-51.
[6] *Id.* at 254.
[7] *Id.* at 257.
[8] *Id.*

Super. Ct. 2007) concluded that the standard AIA indemnification provision did not authorize the imposition of contractor's direct liability to an owner in part because an indemnity clause "generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons".

The instances where the contract here at issue differs from the AIA indemnification provision do not sufficiently broaden the scope of the clause to permit the award that Monte-Brewer seeks. The contract here omits the standard phrase "(other than the Work itself)," the inclusion of which means that the contractor is not obligated to indemnify for "injury or damage to the work itself."[9] But in the Court's view that omission does not change the requirement that losses must stem from third party claims against the owner. The presence or absence of the phrase "(other than the Work itself)" by itself had no bearing on the courts' conclusions as to the reach of the indemnification provision in the aforementioned cases.

The Court notes the reasoning of Washington Court of Appeals' in *Heritage at Deer Creek Assocs., L.L.C. v. Kirtley-Cole Assocs., Inc.*:

> "Kirtley-Cole has a duty to indemnify Heritage for Condominium Act violations only if the condominium owners' harm was within the scope of personal injury, which was clearly not the case, or if the harm was 'injury or destruction of tangible property.' The owners association's claims concern the quality of construction, not injury or destruction of property. The distinction between construction defects and injury to tangible property turns on the nature of the defect and the manner in which the damage occurred. Injury to tangible property occurs when property is damaged and thus decreases in value. A construction defect is not 'injury,' but rather poor craftsmanship or design and it occurs during production, adversely affecting the quality and value when complete. The harm is inherent in the finished project, rather than caused by subsequent 'destruction.'"[10]

Monte-Brewer contends that if there is ambiguity in the indemnification provision at issue the ambiguity should be resolved in his favor, because he did not draft any part of the six contracts he signed on December 3, 2012. The interpretive rule in question is *contra proferentum*, which provides that "[s]ince the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter."[11]

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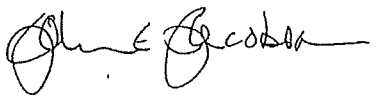
[9] AIA Document Commentary, *supra*, note 1.
[10] 128 Wash. App. 1065 (2005).
[11] 11 Williston on Contracts § 32:12 (4th ed.).

But *contra proferentum* is a secondary rule of interpretation. It applies only when words or phrases remain unclear or ambiguous after application of the primary rules,[12] such as assessment of the plain meaning and reading the contract as a whole (the "four corners" rule); and, in the Court's view, here the application of *contra proferentum* in favor of Monte-Brewer is inappropriate because, for the reasons discussed, the great bulk of authority interpreting similar indemnification clauses makes it clear that the effect of the clause was to require Bear Tracks to Monte-Brewer for attorneys fees he incurred in defending himself against third-party claims related to damages arising from Bear Tracks' work.

ORDER

For the foregoing reasons, the motion of the Plaintiff Lee Monte Brewer for adding the amount of his attorneys' fees to the Judgment that the Court has awarded to him in this matter is DENIED.

March 4, 2019



John E. Jacobson
Chief Judge of the
Shakopee Mdewakanton Sioux Community

[12] *Id.*, § 32:1.