

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT SCHOOL DISTRICT,

Plaintiff,

v

URS CORPORATION, DESIGN COLLECTIVE
and TDC/URS, a/k/a TDC/URS CORPORATION,

Defendants/Third-Party Plaintiffs-
Appellants,

and

MARK ENGLISH, EMMETT B. HAGOOD, JR,
CAROLE HARRIS, GARY BALDWIN, HARISH
CHOPIA, CINDY GARCIA, THOMAS
HAMPSON, WILLIAM STEVENSON and
BEVERLY HANNAH JONES,

Defendants/Third-Party Plaintiffs,

v

BAILEY TURNER VENTURE, EL BAILEY
COMPANY, INC, and TURNER
CONSTRUCTION,

Third-Party Defendants/Appellees.

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Third-party plaintiffs URS Corporation, Design Collective, and TDC/URS, a/k/a TDC/URS Corporation (collectively TDC/URS) appeal a trial court order that granted summary disposition to third-party defendants Bailey Turner Venture, El Bailey Co Inc, and Turner Construction (collectively BTV) under MCR 2.116(C)(8). We affirm.

The Detroit School District (District) contracted with TDC/URS (the TDC/URS-District contract) for TDC/URS to provide architectural and engineering services for the construction of two elementary schools. The District also contracted with BTV (the BTV-District contract) for BTV to manage the construction of the two schools. Thereafter, the District sued TDC/URS for breach of contract, professional malpractice, and declaratory and injunctive relief. The District alleged that TDC/URS failed to meet certain deadlines for construction documents and caused a substantial delay in construction on both projects. The District further asserted that the documents contained substantial errors that resulted in additional costs to the District. The trial court ordered the District and TDC/URS to arbitrate the claims as required under the TDC/URS-District contract. TDC/URS and its affiliates filed a third-party complaint against BTV for contractual indemnification under the BTV-District contract and asserted that it is an intended third-party beneficiary under that contract. They further asserted a claim for unjust enrichment and, alternatively, asked the trial court to order TDC/URS's third-party claims to be arbitrated pursuant to the BTV-District contract. The trial court ultimately dismissed TDC/URS's third-party complaint.

Arbitration

“ [A] party cannot be required to arbitrate when it is not legally or factually a party to the agreement. ” *St. Clair Prosecutor v AFSCME*, 425 Mich 204, 223; 388 NW2d 231 (1986). While TDC/URS admits that it does not have an express agreement with BTV to arbitrate its claims, TDC/URS nevertheless argues that it can compel arbitration for two reasons: (1) as a signatory under the TDC/URS-District contract and (2) as a nonsignatory under the BTV-District contract.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).¹ Likewise, the determination of whether an issue is subject to arbitration is a question of law reviewed de novo. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 591; 637 NW2d 526 (2001). “ The first inquiry into the arbitrability of a dispute is to determine whether an arbitration agreement has been reached by the parties. ” *Id.* at 590-591 (citation omitted). For arbitration to be compelled, the parties must have a valid agreement to do so. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982).

To support its signatory argument, TDC/URS relies on two Michigan cases that are factually and legally inapposite. The first case, *Jozwiak v Northern Michigan Hosp, Inc*, 207 Mich App 161, 167-168; 524 NW2d 250 (1994), involved a derivative third-party medical

¹ A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmoving party, and the motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* A contract is considered part of pleading when, as here, the contract is attached to the pleading. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

malpractice claim against a hospital for loss of society and companionship brought by the injured party's children. In *Jozwiak*, though the children were nonsignatories to the injured party's arbitration agreement, the Court concluded that the children's claims were subject to the agreement because the actions were derivative. *Id.* at 168. TDC/URS also relies on a second case that involved a derivative claim brought by a husband arising out of alleged medical malpractice in which the spouses' child sustained injuries during childbirth. *Harte v Sinai Hosp of Detroit*, 144 Mich App 659, 661-662, 664; 375 NW2d 782 (1985). The *Harte* Court concluded that, though the husband was not a party to the arbitration agreement, the husband was bound by the arbitration agreement and was required to arbitrate his derivative claim. *Id.* at 664.

Jozwiak and *Harte* stand for the proposition that a party pursuing a derivative claim is bound by the injured party's agreement mandating arbitration. Here, TDC/URS relies on its own arbitration agreement with the District in an attempt to compel BTV to arbitrate the third-party claims. However, TDC/URS's reliance on that contract and the above cases is misplaced because BTV is not pursuing a claim against TDC/URS.

Further, in light of our Supreme Court's clear holding in *AFSCME*, *supra* at 223, that a non-party to an agreement cannot be compelled to participate in arbitration under that agreement, we reject TDC/URS's argument, based solely on foreign case law, that it can compel arbitration as a nonsignatory to the BTV-District contract. Accordingly, we affirm the trial court's grant of summary disposition to third-party defendants.

Indemnification

TDC/URS also says that the trial court erred when it granted summary disposition to BTV because there is a question of fact whether the BTV-District contract can be reasonably construed to require BTV to indemnify TDC/URS for its potential loss to the District under the TDC/URS-District contract. We disagree.

Interpretation of a contract is a question of law reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Whether contractual language is ambiguous is a question of law reviewed de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Only intended, rather than incidental, third-party beneficiaries may sue when a contractual promise in their favor has been breached. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). More specifically, "[a] third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof." *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993) (citation omitted). An intended third-party beneficiary contract arises only when the contract establishes that a promisor has undertaken an express promise directly to or for a third party. *Id.* at 428; MCL 600.1405. Further, determining that a contract establishes an intended third-party beneficiary through a direct promise to the third party must be based on an objective review of the form and meaning of the contract. *Schmalfeldt, supra* at 428. "Contractors, subcontractors, and their employees are generally held not to be the third-party beneficiaries of the contract between the general or supervisory contractor and the project owner." *Dynamic Constr Co v Barton Malow Co*, 214

Mich App 425, 428; 543 NW2d 31 (1995). Rather, contractors are considered to be merely incidental beneficiaries of such a contract. *Id.* at 430.

An indemnity provision requires the indemnitee to make an indemnitor whole after the indemnitor has sustained a loss. *Langley v Harris Corp*, 413 Mich 592, 596; 321 NW2d 662 (1982). Indemnity contracts are construed in the same manner as contracts generally. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005).²

The following are the relevant provisions with “Owner” referring to the Detroit School District and “Construction Manager” referring to BTV:

9.6 This Agreement shall inure solely to the benefit of the parties hereto and their successors and permitted assigns as above provided, and is not intended to and shall not create rights of any nature or cause of action in favor of any third parties.

13.1.1 Construction Manager shall indemnify, defend, save and hold harmless Owner and its officers, directors, trustees, members, affiliates, subsidiaries, employees, separate contractors and agents, including the Program Manager and all of its members and their employees and agents, free from and against any and all loss, liability, penalties, lawsuits, damages, losses, costs and expenses (including court costs, actual attorneys’ fees and witness fees), actions, causes of action, claims or judgments which arise out of or are caused by negligent and/or intentional (a) actions, errors, omissions or partial or complete failure to fulfill its duties and obligations under this Agreement by Construction Manager, any of its contractors, subcontractors, consultants, suppliers, employees, agents or any person or organization from whom Construction Manager is legally liable, or (b) death, disease or injury to any person, or any damage to or destruction of property occasioned by, incident to, arising out of or in connection

² A contract must be construed in its entirety. *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000). Generally, the purpose of contract interpretation is to enforce the parties’ intent, and if the language is unambiguous, interpretation is limited to the actual words used. *Burkhardt, supra* at 656. Accordingly, a clear contract must be enforced according to its terms. *Id.* A court must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Further, an indemnity contract should be interpreted in a manner that affords reasonable meaning to all of its provisions. *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). However, if provisions of a contract irreconcilably conflict, the contractual language is ambiguous, and the ambiguous contractual language presents a question of fact to be decided by a jury. *Klapp, supra* at 467, 469. A contract is ambiguous if its terms are reasonably susceptible of more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

with Construction Manager's performance under this Agreement or the act, error or omission or misconduct of Construction Manager. . . .

We hold that the above provisions can be reasonably construed together and are therefore unambiguous. Specifically, ¶ 13.1.1 can be construed as a provision concerning BTV's obligation to indemnify, i.e., BTV must indemnify the District including its agents and independent contractors for liability resulting from BTV's breach of contract. However, ¶ 9.6 can be harmoniously construed with ¶ 13.1.1 as a provision concerning who has the right to enforce the indemnity provision, i.e., the District solely has the right to enforce the indemnification provision including its right to seek indemnification for those enumerated individuals and entities because ¶ 9.6 plainly provides that the BTV- District contract does not create any third-party beneficiary rights.³ This construction accords with the principle of contract construction that a contract should be construed so that all of its provisions are enforced. *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). And contrary to TDC/URS's argument, this construction would not render ¶ 13.1.1 nugatory because the indemnification provision remains effective with the District solely maintaining the right to enforce the provision on behalf of those enumerated parties if BTV is found to have breached the BTV-District contract. Thus, the trial court did not err in dismissing TDC/URS's claim for contractual indemnification because TDC/URS cannot bring suit under the BTV-District contract.

Unjust Enrichment

TDC/URS further claims, incorrectly, that it adequately pleaded a claim for unjust enrichment. Unjust enrichment occurs when one party receives a benefit from another, which would be inequitable to retain. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, no contract will be implied if there is an express contract. *Id.* TDC/URS admits that its claim for unjust enrichment is based on the BTV-District contract in which BTV expressly agreed it would remain responsible for harm arising out of its failure to perform its duties under that contract. Therefore, because TDC/URS relied on the BTV-District contract, TDC/URS has failed to state a claim for unjust enrichment. *Martin, supra* at 177.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper

³ Moreover, as noted above, independent contractors are generally considered mere incidental beneficiaries of a contract between a project owner and the project supervisor. *Dynamic, supra* at 428, 430.