IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

HKS ARCHITECTS, INC.	)	**CASE NO. CV 12 777455**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
MICHAEL BENZA & ASSOCIATES, INC.	)	**JOURNAL ENTRY**
	)	
Defendant.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff HKS Architects, Inc. filed this lawsuit on March 6, 2012. The complaint asserts causes of action for breach of contract and declaratory judgment. The defendant, Michael Benza & Associates, Inc., filed an answer generally denying that HKS is entitled to the relief it seeks.

The plaintiff filed a motion for summary judgment on June 15. That motion is now fully briefed and this entry follows.

STATEMENT OF FACTS

HKS is, as its name suggests, an architectural firm. On January 15, 2007, HKS entered into a contract with University Hospitals Health System, Inc. to provide architectural services for a project known as the Ahuja Medical Center. HKS's basic responsibility under the contract was to "provide all professional services necessary for the complete design and documentation of the project."[1] The contract explicitly anticipates that HKS may subcontract its duties to other design professionals by providing that "the services performed by the

[1] Exhibit A to the complaint, UHHS/HKS contract, page 2, § 1.1.

architect, architect's employees and architect's consultants shall be as enumerated" in the contract.[2] On the same date that HKS made its contract with UHHS, it also entered into a "standard form of agreement between architect and consultant" with Michael Benza & Associates, Inc. This agreement is a subcontract by which Benza agreed to undertake civil engineering services that HKS owed to UHHS by the first contract.

The subcontract says that Benza "shall not have any duties or responsibilities" other than for civil engineering consulting services "as shown in Exhibit B" to the contract.[3] Exhibit B, which apparently details Benza's specific scope of work, is not part of the record. However, HKS's affidavit in support of summary judgment describes Benza's scope of work as "the parking lot flexible paving and adjacent sidewalk areas of the project as well as the under-pavement drainage systems."[4] Benza does not deny that it designed the parking lot flexible paving and its associated under-pavement drainage. However, Benza does dispute that it designed the "adjacent sidewalk areas" and their under-drainage systems.[5]

After the contracts were signed, design and construction of the building started and finished. Then, on October 17, 2011, University Hospitals formally notified HKS of an alleged breach of the first contract. Specifically, UHHS claimed the following:

> Please accept this correspondence as formal notice by University Hospital Health System ("UHHS") that it contends HKS Architects, Inc. has breached the January 15, 2007 Owner/Architect Agreement for the Ahuja Medical Center.
>
> As you are aware, the completed parking lot flexible paving and adjacent sidewalk areas of the Ahuja Medical Center have failed. UHHS has formed the opinion that the design of those areas, as reflected on the final Construction Documents issued by HKS, failed to provide sufficient under-pavement drainage systems for the conditions found at the Ahuja Medical Center site. This failure is

[2] Id.
[3] Exhibit B to the complaint, HKS/Benza contract, p. 2, §1.2.
[4] Exhibit A to plaintiff's motion for summary judgment, affidavit of Craig Williams.
[5] Exhibit A to defendant's brief in opposition to motion for summary judgment, affidavit of Steven R. Benza, ¶¶7 and 8.

> a breach of the Standard of Care as expressed in the Owner/Architect Agreement. . . . These conditions have necessitated the need for substantial repairs which . . . require . . . installation of a suitable under-pavement drainage system . . .
>
> . . . UHHS has determined that the vast majority of these costs would not have been incurred but for the failure to design the necessary subpavement drainage system. Accordingly, UHHS looks to HKS for reimbursement of those costs attributable to this breach of the Standard of Care.[6]
>
> ***

The contract provision that UHHS claims HKS breached is apparently §1.11.4, which requires HKS to "exercise the highest generally accepted degree of care and diligence" of an architect.[7] UHHS did not make a claim directly against Benza, despite its ability to do so under §9.7 of the contract with HKS. That section makes UHHS an intended third-party beneficiary of the contract between HKS and Benza.

Upon receipt of UHHS's notice of claim, HKS sent the notice to Benza with a request that Benza provide a defense for HKS. That request was based upon section 8.3 of the HKS/Benza contract. That section is at the core of this lawsuit and provides, in pertinent part:

> §8.3 The Consultant [Benza] shall indemnify and hold the Architect [HKS] and the Architect's officers and employees harmless from and against damages, losses and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are caused by the negligent acts or omissions of the Consultant, its employees and its consultants in the performance of professional services under this Agreement. . .
>
> In the event a claim is made against the Architect alleging damages that are claimed to have been caused by the Consultant, . . . the Consultant agrees that it shall at its expense . . . defend the claim and the Architect through resolution of the claim by negotiation, mediation, trial, or arbitration if applicable. Such defense shall include all attorneys' fees and expenses, expert witness fees and expenses, costs of mediation, and costs of court . . .[8]

[6] Exhibit 3 to the motion for summary judgment, UHHS's October 17, 2011 notice of claim.
[7] Exhibit A to the complaint, UHHS/HKS contract, p. 3, §1.11.4.
[8] Exhibit B to the complaint, HKS/Benza contract, pgs. 7 and 8, §8.3.

Benza declined to defend HKS against UHHS's claim on the basis that "University Hospital has not alleged that Michael Benza & Associates, Inc., committed any negligent acts or omissions."[9] This lawsuit followed.

LAW AND ANALYSIS

HKS's first cause of action is for Benza's breach of its agreement to defend and indemnify HKS against the hospital's claims for damages arising from Benza's own negligence. The second cause of action is for a declaratory judgment that Benza is obligated under the contract to provide for HKS's defense against UHHS's claim.

In support of its motion for summary judgment, HKS argues that "University Hospitals made a claim that is squarely within the scope of Benza's work" so Benza must provide a defense and, if the claim is proved, indemnity.[10] Benza opposes the motion on the basis that UHHS has not made "an allegation that MBA breached its standard of care in any way."[11] Benza also contends that it should not have to provide a defense because UHHS alleged negligent design of sidewalks that was not within the scope of Benza's services. Finally, Benza argues that Ohio's anti-indemnity statute at section 2305.31 of the Ohio Revised Code precludes the enforcement by HKS of section 8.3 of the contract.

Because the plaintiff is seeking a summary judgment, it is obligatory to note that a court may not grant summary judgment unless the evidence demonstrates that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law and (3) it appears from the evidence that reasonable minds can come to but one conclusion and, after viewing the evidence most strongly in favor of the nonmoving party, that

[9] Exhibit 4 to the plaintiff's motion for summary judgment, November 10, 2011 denial letter of Lauren Bayly to HKS.
[10] Plaintiff's motion for summary judgment, p. 5.
[11] Defendant's brief in opposition to motion for summary judgment, p. 3.

conclusion is adverse to the party against whom the motion for summary judgment is made. *Pierce v. Woyma*, 8th Dist. No. 97545, 2012-Ohio-3947, ¶12. However, this case does not involve primarily a dispute about the evidence. Instead, the dispute is over the legal significance of the evidence: namely, whether UHHS's notice of claim constitutes an allegation of damages "claimed to have been caused by"[12] Benza, thus triggering Benza's duty to defend. Because of that, the court will first address HKS's claim for summary judgment on the declaratory judgment cause of action.

Section 2721.03 of the Ohio Revised Code provides that any person interested under a written contract may have determined any question of construction or validity arising under the contract and obtain a declaration of rights, status, or other legal relations under it. A contract may be construed by a declaratory judgment or decree either before or after there has been a breach of the contract. R.C. 2721.04. When an action or proceeding in which declaratory relief is sought under this chapter involves the determination of an issue of fact, that issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the action or proceeding is pending. R.C. 2721.10. Hence, summary judgment is an appropriate means for resolving declaratory judgment actions. *Slam Jams II v. Capitol Indem. Corp.*, 8th Dist. No. 69754, 1996 Ohio App. LEXIS 3106 (July 18, 1996).

If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.*, 15 Ohio St.3d 321, 322 (1984). In deciding whether there is an ambiguity in the contract, common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced

[12] HKS/Benza contract, §8.3, p. 8.

from the face or overall contents of the instrument. *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St. 2d 241 (1978), syllabus 2. Ordinarily, then, a court cannot discern the intent of the parties to a contract without considering the context of a disputed provision.

In this case, the intent that each architect would be liable for its own mistakes is clear. Benza agreed to indemnify HKS only for damages "caused by [Benza's] negligent acts and omissions"[13] At the same time, HKS agreed to indemnify Benza for damages "caused by [HKS's] negligent acts and omissions."[14] Moreover, to the extent that both parties might be comparatively liable for damages they agreed that Benza would indemnify HKS "according to [Benza's] percentage of responsibility or fault."[15] The context, then, of Benza's agreement to defend is its recognition that it will step into HKS's position and indemnify HKS for liability the architect incurs under its contract with UHHS where the work giving rise to the liability was done by Benza.

The focus of the duty to defend is thus not on the name of the party that a claimant identifies as a wrongdoer, but on which architect did the work the claimant alleges was faulty. Here, the claimant, UHHS, alleged that its damages resulted from the faulty design of the flexible paving under-pavement drainage system. Nobody disputes that Benza designed the under-pavement drainage of the flexible paving. Therefore, UHHS's notice of claim alleges damages "claimed to have been caused by" Benza even if the notice does not name Benza because, if the allegation is true, nobody other than Benza could have negligently designed the system. Benza unquestionably designed the system and Benza unquestionably has the duty to defend HKS against any claim alleging defective design of the system.

[13] Id., p. 7.
[14] Id., §8.4, p. 8.
[15] Id., §8.3, p. 7.

Absurdity would result if Benza's interpretation were correct. Would Benza, for example, consent to undertake the defense of a claim for defective structural engineering, one of HKS's areas of responsibility,[16] if a claimant alleged that Benza did the faulty structural engineering? Almost certainly not, since HKS and Benza did not intend to leave themselves at the mercy of a claimant's choice of labels. Rather, they agreed that the substance of the claim would dictate who should defend. As a result, the plaintiff's motion for a summary declaratory judgment is granted, and the court finds as a matter of law that Benza is obligated, at its expense, to defend UHHS's claim that the parking lot flexible paving under-pavement drainage system was incorrectly designed.

That declaration, however, does not include an order that Benza must undertake the defense of all of the claims asserted by UHHS in the arbitration against HKS. By contract Benza agreed to defend only claims for damages arising from Benza's own negligence. Yet the notice of claim asserts as negligent not only the parking lot flexible paving under-pavement drainage system designed by Benza, but also the design of "the adjacent sidewalk areas."[17] By Williams's affidavit Benza claims that it did not design those areas. That testimony creates an issue of fact precluding summary judgment on the issue of whether Benza must provide for a defense of that separate portion of UHHS's claim.

By finding that HKS is entitled to at least a partial defense from Benza in the arbitration commenced by UHHS, the court necessarily grants HKS's motion for summary judgment on the breach of contract cause of action, but only to the extent that the court finds a contract to undertake the defense exists, that HKS did not breach the contract, and that Benza breached the

[16] Section 12.1.2 of the HKS/Benza contract suggests that structural engineering was not sub-contracted by HKS.
[17] Exhibit 3 to the motion for summary judgment, UHHS's October 17, 2011 notice of claim., ¶2.

contract by not providing for a defense to date. But a genuine issue of material fact remains about the amount of damages proximately caused to the plaintiff as a result of Benza's breach.

CONCLUSION

Consistent with the foregoing, the court declares that Benza is obligated, at its expense, to defend UHHS's claim in arbitration that the design of the parking lot flexible paving under-pavement drainage system at the Ahuja Medical Center is deficient, and the plaintiff's motion for summary declaratory judgment is granted to that extent.

The court also finds that the defendant breached its obligation under the contract by failing to defend from the filing of the arbitration to date the claim that the parking lot flexible paving under-pavement drainage system was incorrectly designed, and the plaintiff's motion for summary judgment is granted to that extent.

Left for decision on the evidence are 1) whether Benza must undertake the entire defense of the arbitration and 2) the amount of damages incurred by HKS as a result of the breach.

Finally, although the complaint mentions Benza's duty to indemnify, the declaratory relief sought in the complaint is only for judgment "regarding [Benza's] duty to defend,"[18] and the motion asks for the same thing, with no mention of the duty to indemnify. Therefore, because the issue is not before the court, this entry does not address the parties' rights and obligations under the indemnity provisions of sections 8.3 and 8.4 of the contract. Yet it is worth noting that a declaration on that subject would be premature anyway without a decision on the merits at the arbitration of what, if anything, was negligently designed and an accompanying damage award. Because a declaration of the rights and obligations under the

[18] Complaint, unnumbered paragraph, p. 3.

indemnity provisions is not currently before the court, the court rejects the defendant's argument that Benza's agreement to defend is barred under Ohio's anti-indemnity statute.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by e-mail, this _____ day of September, 2012, to the following:

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_____
Judge John P. O'Donnell