

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

DENNIS COMIA,)
) NO. 3:01-cv-30008
 Plaintiff,)
)
 vs.)
)
 ROQUETTE AMERICA, INC.,) RULING ON THIRD-PARTY
) DEFENDANT'S MOTION FOR
 Defendant.) SUMMARY JUDGMENT
 -----))
 ROQUETTE AMERICA, INC.,)
)
 Third-Party Plaintiff,)
)
 vs.)
)
 JAY INDUSTRIAL TECHNOLOGIES)
 GROUP, INC., d/b/a ALLIED)
 VALVE INDUSTRIES, INC.,)
)
 Third-Party Defendant.)

This matter is before the Court on third-party defendant's motion for summary judgment (#41). The underlying claim in this case involves a personal injury accident at the premises of third-party plaintiff Roquette America, Inc. (hereinafter "Roquette") on April 27, 1999. Roquette claims indemnity against third-party defendant Jay Industrial Technologies Group, Inc., ("Jay") on the basis of an alleged oral modification to a purchase order which incorporated a contractual indemnity provision. The case was referred to the undersigned pursuant to 28 U.S.C. § 636(c).

I.

A party is entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that [movant] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Id. at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). The court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue meriting a trial. Tlamka v. Serrell, 244 F.3d 628, 634 (8th Cir. 2001) (citing Grossman v. Dillard Dep't Stores, Inc., 47 F.3d 969, 971 (8th Cir. 1995)); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990). "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under the applicable law." Hammer v. City of Osage Beach, Mo., 318 F.3d 832, (8th Cir. 2003).

II.

The underlying facts are essentially undisputed for the purposes of the present motion. Roquette America owned and operated

a corn products processing facility in Keokuk, Iowa. On June 11, 1997 Roquette entered into a written contract for services or work that would be performed at its plant sites with Allied Valve Industries, Inc. ("Allied"), contract number 97-154A (Ex. C to Third-Party Defendant's Appendix). The contract contained an indemnity provision in relevant part as follows:

To the fullest extent permitted by law, . . .
[Allied] shall indemnify and hold harmless . .
.[Roquette] . . .from and against claims . .
.including but not limited to attorneys' fees,
arising out of or resulting from performance
of the Work, provided that such claim. . .is
attributable to bodily injury. . . but only to
the extent caused in whole or in part by
negligent acts or omissions of [Allied]. .
.regardless of whether or not such claim . .
.is caused in part by a party indemnified
hereunder.

(Ex. E at 7).

Allied sold its assets to Jay by an Asset Purchase Agreement dated December 14, 1998. (Ex. D to Third-Party Defendant's Appendix). Jay thereafter did business as Allied, though it did not, in the purchase agreement, assume Allied's contractual liabilities.

Roquette contacted Jay to inspect safety valves on Roquette's boilers at its Keokuk plant. Jay quoted the work and, on March 12, 1999, Roquette issued purchase order 028006/K9. (Ex. H at 54). The purchase order incorporated the terms and conditions of contract number 97-154A. For present purposes there is no dispute that a contract to perform the work designated in the purchase

order resulted and that the contract included the indemnity provision quoted above.

Plaintiff Dennis Comia was employed as a Field Service Technician by Jay. On April 27, 1999 Comia was assigned to perform the work with his brother Frank, who was in charge. A representative of Roquette, Mike Baum, asked the Comias to check a safety relief valve on the roof of Building #12 that was "popping off" early. (Ex. F at 31-32). Work on Building #12 was not included in the purchase order. In his affidavit, Baum states he told Frank Comia to include the extra work on the "open p.o." (Ex. L). It was common for Jay's technicians to be requested to perform extra work in the field and Jay instructed them to accept extra work if possible. Extra work was billed on an existing purchase order or a new one, a decision Jay made after the work was performed. (Ex. J at 82-83).

Dennis Comia sustained injuries when the relief valve on Building #12 released, spraying scalding water on him. Jay later billed Roquette under purchase order 028006/K9 for the work performed on Building #12 and was paid.

Dennis Comia has sued Roquette on a theory of premises liability. Roquette raised the affirmative defense of comparative fault and brought a third-party complaint against Jay, claiming breach of the contractual indemnity provision. Roquette alleges the original purchase order was orally modified to include the work on

Building #12 and as a result that work also was subject to the indemnity provision. Jay contends the oral agreement to do the work on Building #12 was a separate agreement not subject to the indemnity provision. So, the question is, was the work that resulted in the injury performed under the existing contract, or a new, oral one?

III.

Iowa law applies in this diversity action. The exclusive remedy rule of the Iowa workers' compensation statute, Iowa Code § 85.20, does not completely bar "suit against an employer by a third party where the employer has breached an independent duty to the third party." McComas-Lacina Const. Co. v. Able Const., 641 N.W.2d 841, 844 (Iowa 2002). A contract to indemnify creates an independent duty. Iowa Power & Light Co. v. Abild Const. Co., 259 Iowa 314, 322-23, 144 N.W.2d 303, 308 (1966). An indemnity provision "'ordinarily will be enforced between the parties according to its terms.'" Id. (quoting Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc., 540 N.W.2d 647, 649 (Iowa 1995)).

Written contracts may be modified by subsequent oral agreements: "The new contract consists not only of the new terms agreed upon but of as many of the terms of the original contract as the parties have not abrogated in their modification agreement." DeWaay v. Muhr, 160 N.W.2d 454, 456 (Iowa 1968); see Mosebach v.

Blythe, 282 N.W.2d 755, 760 (Iowa App. 1979). A modification agreement "may be either express or implied from acts and conduct" of the parties. Dav. Osteopathic Hosp. Ass'n v. Hospital Service, Inc., 261 Iowa 247, 253, 154 N.W.2d 153, 157 (1967); Tindell v. Apple Lines, Inc., 478 N.W.2d 428, 430 (Iowa App. 1991); Mosebach, 282 N.W.2d at 760. Whether a contract has been modified is ordinarily a fact question. Dav. Osteopathic, 261 Iowa at 253, 154 N.W.2d at 157; Tindell, 478 N.W.2d at 430; Mosebach, 282 N.W.2d at 760.

Roquette argues the existing contract was modified with respect to the scope of the work performed when Jay's agent, Frank Comia, was asked to and agreed to perform the additional work on Building #12. No other terms of the contract were modified or abrogated. Jay responds that Comia had no knowledge of the indemnity provision in the contract, had not been involved in its negotiation, and therefore could not have agreed, had he had the authority, to modify the contract to subject the work on Building #12 to the indemnity provision. Further, as Jay sees it the alleged modification must have occurred after the injury as evidenced by the fact that Jay's decision to bill the work on Building #12 under the original purchase order was made by Jay after the injury had occurred. No contractual indemnity arises with respect to past occurrences unless the parties' intention to indemnify liability

for past events is "plainly manifest[]," not the case here. Evans v. Howard R. Green Co., 231 N.W.2d 907, 916 (Iowa 1975).

It is no doubt true that Frank Comia was unaware of the indemnity provision and that neither he nor Baum had it in mind when they agreed on the Building #12 work. However, it is not essential to Roquette's modification theory that Frank Comia have specifically agreed to subject the work on Building #12 to the indemnity provision in the existing contract. Nor does the subsequent billing on the original purchase order necessarily make the claimed modification after-the-fact.

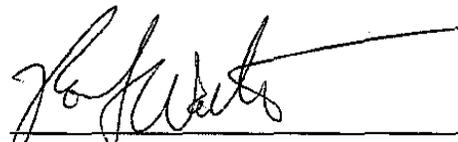
Jay's representative, Mr. Canner, has testified (1) it was common for Jay's technicians to be asked to perform additional work in the field; (2) technicians were told to accept the extra work; and (3) Jay did not require the technicians to call back for authorization before performing additional work. (Ex. J at 82). The requested additional work appears to have been the same type of work the Comias had come to Roquette's premises to perform, checking safety valves. Mr. Baum of Roquette asked the Comias to perform the extra work on Building #12 under the "open p.o." (Ex. L). Jay had agreed to perform the work called for in that purchase order under the contract with the indemnity provision. The Comias agreed to do the work, in the course of which the injury to Dennis Comia occurred. As requested, Jay billed the additional work under the original purchase order. Viewing these facts, and the

reasonable inferences which flow from them, favorably to Roquette, the jury could conclude the parties, through their agents Frank Comia and Baum, agreed to a modification of the scope of the work performed under the existing contract with its indemnity provision. The jury could view the subsequent billing under the original purchase order as evidence of an understanding by Jay that the work on Building #12 had been performed under the existing contract, rather than as evidence of an after-the-fact modification.

It follows from the foregoing that there are genuine issues of material fact as to the contract modification on which the third-party indemnity claim depends. The motion for summary judgment is denied.

IT IS SO ORDERED.

Dated this 14th day of April, 2003.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE