Rick West v. Geosolutions, Inc. **16CVP0254**

Re: Plaintiff's Motion for Summary Adjudication

Date: November 7, 2017

Rick West (West) brings this action against Geosolutions, Inc. (Geosolutions) for damages arising from the "settlement" of the floor slabs in his residence. According to West, Geosolutions improperly recommended the use of graded engineered fill pads in contradiction to its earlier recommendation of a drilled pier foundation system. The complaint includes one cause of action for professional negligence.

West then filed an amended complaint naming Jonna Louise Otto (Otto) as a defendant. Otto is a professional engineer employed by Geosolutions and is the engineer that signed and stamped the February 7, 2006 addendum report that West contends is defective and the cause of the floor settlement.

Geosolutions and Otto's eighth affirmative defense alleges that any liability for professional negligence against Geosolutions and Otto is limited to $25,000 as agreed to in West's contract with Geosolutions.

West now moves for summary adjudication as to the eighth affirmative defense as it applies to Otto. According to West the parties agree that this issue needs to be resolved before substantial litigation expenses are incurred. West asset the limit of liability provision in Geosolutions' contract does not apply to the negligence of Otto as she was not a party to the contract and she is individually liable for her own tort.

West as the moving party has the initial burden to make a prima facie showing that there are no triable issues of material fact and that he is entitled to a judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850) If West makes a prima facie showing then the burden shifts to Otto and Geosolutions to produce admissible evidence showing a triable issue of material fact exists. [CCP §437c(p)(2)]

Here, the Court does have authority to summarily adjudicate West's assertion that the eighth affirmative defense is without merit. [CCP §437c(f)(1)] West must negate an essential element of the defense, or establish the defendant does not possess and cannot reasonably obtain evidence needed to support the defense. (See's Candy Shops, Inc. v. Superior Court (2012) 210 Cal.App.4th 889, 900)

In support of the motion, West sets forth eight undisputed material facts which essentially establish that Otto did not individually contract with West and that Otto was the engineer that prepared, signed and stamped the February 6, 2006 report. West argues that any damages caused by Otto based on her negligence are not limited by Geosolutions' contract with West because Otto is not a party to the contract.

West first emphasizes that under Bus. & Prof. Code §6735, that Otto as the engineer signed and stamped the report and is responsible for and liable for what is in the report. (See *Wynner v. Buxton* (1979) 97 Cal.App.3d 166, 176—"[I]t (section 6735) does make the civil engineer responsible for the plans which he signs.") Next, West argues Otto's status as Geosolutions' employee does not immunize her from personal liability. Under general agency principals an agent is individually responsible for his or her own torts. (*Fleet v. Bank of Am. N.A.* (2014) 229 Cal.App.4th 1403, 1411) As such, West concludes Otto remains responsible for and personally liable for her torts even committed within the scope of her employment. (*Shafer v. Berger*, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 68).

Both Geosolutions and Otto oppose the motion and assert the damages limitation clause applies to West's claims for professional negligence against Otto, the individual employee who performed the work under the contract. Geosolutions points out that West fails to cite to any authority to support his position that the limit of liability does not apply to Otto's negligence. Geosolutions also emphasizes that it can only perform its obligations under the contract through its employees such that if the Court were to follow West's reasoning the limitation of liability provision, which is valid under California law, would be rendered meaningless.

The subject limit of liability provision specifically states that it applies to "all work performed by GEOSOLUTIONS INC. in connection with the Project whether or not the entire scope of such work is described herein." Because Geosolutions as the employer is vicariously liable for the torts of its employees, Geosolutions argues to exclude Otto's negligence would make the provision meaningless. To protect against the limit of liability West had the option to purchase a waiver, but elected not to. Also, Geosolutions highlights the fact that West was billed for work performed by Geosolutions and not for Otto's individual work.

Again, the essence of Geosolutions' opposition is that because it is an artificial person it must act through its employees. (*Acco Contractors, Inc. v. McNamara & Peepe Lumber Co*. (1976) 63 Cal.App.3d 292, 296) Also, Geosolutions emphasizes that California law requires that a contract be interpreted to give its full effect and should not be interpreted to render any provision null or void. (Civil Code §§1641, 1643 and 3541) In sum, to not apply the limit of liability provision to work performed by Otto would completely negate and void the intent of the provision.

In support of its arguments in opposition to the motion Geosolutions sets forth 21 additional undisputed facts which establish that West hired Geosolutions and Geosolutions' work under the contract was performed by Otto, but payment was made to Geosolutions.

The facts in this matter are essentially undisputed. The question is whether Otto's liability for alleged negligent work as an engineer, while employed by Geosolutions, is subject to the limit of liability provision in Geosolutions' contract with West. Interestingly, neither side cites to any authority directly on point.

As stated above, limitation of liability provisions in construction contracts are valid in California. "Clauses of this type 'have long been recognized as valid in California.'" (*Markborough California, Inc. v. Superior Court, supra* 227 Cal.App.3d 705, 714) To follow West's line of reasoning, the limit of liability provision that he agreed to in the contract would be rendered meaningless and unenforceable if he simply named the individual engineer that negligently performed the work. West contracted with Geosolutions to perform the engineering work and that work was necessarily carried out by Geosolutions' employees including Otto.

That being said, an agent or employee is always liable for his or her own torts. Civil Code section 2343(3). Here the employee's principal had contract with West. Surely, the employee, performing work in the course and scope of her employment, is an unnamed third party beneficiary of that contract. The closest case the Court could find is *Johnson v. Holmes Tuttle Lincoln-Mercury* (1958) 160 Cal.App.2d 290, in which an injured party was deemed a beneficiary of the agreement that the driver of the other car had with his employer to provide insurance. What makes the analogies difficult here is that the instant contract provision is a limit on liability as opposed to a promise to perform. Nevertheless, the most reasonable and logical conclusion is that Otto's work under the contract is protected by the limit of liability.

The motion for summary adjudication is denied, as the Court cannot conclude as a matter of law that Otto is not entitled to assert the eighth affirmative defense for protection under the limit of liability.