UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1060

September Term, 2014

KBE BUILDING CORPORATION

v.

DIW GROUP, INC.

Nazarian,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 17, 2015

KBE Building Corporation ("KBE"), as the general contractor for the construction of an ezStorage facility, hired DIW Group, Inc. d/b/a Specialized Engineering ("Specialized") to inspect the structural work on the building. After construction was completed, the owner notified KBE that it had discovered latent defects that eventually required expensive investigation and repairs. The owner sued and KBE asserted third-party claims against Specialized (and others) that were dismissed without prejudice because of the failure to designate an expert. KBE later settled with the owner and sued Specialized in the Circuit Court for Charles County to recover its costs and losses. The circuit court granted Specialized's motion for summary judgment on the grounds that KBE's claims were barred both by the contract that resulted from their dueling contract forms and by limitations, that KBE was not entitled to contractual indemnity, and that KBE conceded at argument that it was not entitled to implied-in-law indemnity or to contribution. We affirm.

I. BACKGROUND

On August 1, 2006, Waldorf Land, L.L.L.P. ("Waldorf") hired KBE to act as general contractor for the construction of a five-story ezStorage building in Charles County (the "Project"). Before being retained formally by Waldorf, Specialized sent KBE a proposal letter that offered to provide inspection engineering services for the Project for $40,000. Attached to the letter was a proposal (the "Proposal"), that set forth the boilerplate terms and conditions of Specialized's proposed engagement. Among other things, the Proposal sought to ensure that its terms prevailed unless the parties agreed otherwise in writing, to limit (severely) KBE's time and ability to assert claims, to limit Specialized's

liability for any claims to the amount of fees paid, and to clarify that the terms of the Proposal trumped any other document's terms in the event of a conflict:

> 16. INTEGRATION. This Agreement consists of these terms and conditions and proposals attached hereto. The terms of this agreement when referenced or used herein means the terms and conditions and all proposals attached hereto. The documents constituting this Agreement alone shall constitute the entire Agreement between the parties and cannot be changed except by a written instrument signed by both parties.
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> * * *
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> 19. LIMITATION OF LIABILITY. In the unlikely event that a claim should arise, [KBE] shall contact [Specialized] in writing setting forth the nature of the claim within ten (10) days of its discovery. [KBE] recognizes that without the aforesaid notice, no claim will be considered and is, by agreement hereunder, waived and released by [KBE]. The making of final payment by [KBE] shall constitute a waiver and release of any and all claims by [KBE], except those previously made in writing and identified by [KBE] as unsettled and pending at the time of final payment. In addition, any provisions hereof or notwithstanding the provisions of any applicable statute of limitations or law, [KBE] agrees that no claim arising out of this [Proposal], its terms or conditions, or the services performed hereunder, may be brought or made or [sic] outside three (3) months of the date of completion regardless of the date of its discovery. By agreement hereunder, all claims not presented by [KBE] to [Specialized] within said three (3) month period are waived and released by [KBE]. In addition, notwithstanding the provisions of any applicable statute or law, the sole and exclusive remedy available to [KBE] for complaints or claims of any nature and upon legal theory, including but not limited to, claims for breach of warranty, for loss of profits, for loss of use, for indemnification, for contribution, for performance or non-performance of any contract obligations arising under this Proposal, or, for negligence of [Specialized], its employees, agents, principals, subcontractors or insurers, is damages in an amount not to exceed the fees actually paid to [KBE] by [Specialized] for services under this Agreement. All other remedies, arising by

> law, statute or otherwise, are hereby expressly waived by [KBE].
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> * * *
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> 21. CONFLICTING CONTRACT CLAUSES. [KBE] agrees that to the extent any of the terms and conditions of this [Proposal] disagree or are inconsistent or in conflict with the terms and conditions of any other contract entered into between [Specialized] and [KBE] prior to or subsequent to the execution hereof which relate to the same project or operations but does not expressly contain an agreement or intent to override, alter or amend the terms and conditions hereof, the terms and conditions of this [Proposal] shall govern and shall serve to supercede [sic], revise, amend, alter and preempt those terms and conditions of such other contract or Agreement which are inconsistent or conflicting.

On September 25, 2006, after KBE was hired as the Project's general contractor, both parties, executed the Proposal. KBE contends, however, that the parties understood that the Proposal "was not a final subcontract and that KBE would submit a final contract form later for Specialized's review."

In early 2007, KBE sent Specialized a two-page form entitled "Labor Supply Contract No. 06044-SF102," and on February 6, 2007, both parties executed this form as well (the "Agreement"). In the Agreement, Specialized agreed to "[p]rovide all construction material testing and inspections . . . in accordance with the fully executed [Proposal]." The Agreement further stated that the Proposal would be "made an attachment to this contract agreement," but provided that "[i]f there is any conflict in language between this contract agreement and the [Proposal], the language of this contract agreement shall prevail." And, as one might expect, some of the boilerplate terms in the Agreement conflict

with boilerplate terms in the Proposal, most notably the Agreement's limitation of liability clause:

> **Article 7.** To the fullest extent permitted by law, [Specialized] shall indemnify and hold harmless [KBE] and its 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 damage, loss or expense (1) is attributable to property damage, bodily injury, sickness, disease or death or loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act of [Specialized], anyone directly or indirectly employed by [Specialized] or anyone for whose acts any of them may be liable. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist.

Work began on the Project in the summer of 2006 and continued until construction was completed in early 2008. On May 8, 2009, Waldorf informed KBE that it had discovered "that the masonry walls at the site were not constructed in accordance with the requirements of the applicable contract documents," and on June 1, 2009, Waldorf sued KBE to recover damages for the defects in the Project. KBE then conducted a lengthy investigation of Waldorf's claims that, it contends, "revealed that there were widespread latent defects in [the] work that was previously inspected and certified by Specialized." KBE spent over $1,000,000 to repair them during two extended periods of work between early 2010 and fall of 2011 to remedy the defects.[1]

[1] KBE eventually settled Waldorf's claims in an agreement they signed on January 4, 2013, the terms of which included payment by KBE of $379,000.

KBE then sued Specialized, and others, on January 7, 2011 to recover the expenses it incurred and expected to incur in repairing the Project's defects and in resolving Waldorf's claims against it. KBE initiated the 2011 suit with a pleading titled "Third-Party Complaint of KBE Building Corporation Against Oldcastle Precast, Inc., Fireguard Corporation, and Specialized Engineering," that asserted six claims: Breach of Contract (Count I); Negligence (Count II); Negligent Misrepresentation (Count III); Contractual Indemnity (Count IV); Implied-In-Law Indemnity (Count V); and Contribution (Count VI) (the "2011 Complaint"). Specialized moved to dismiss and, on April 2, 2013, the circuit court dismissed the complaint without prejudice, finding that KBE had failed to file a timely certificate of a qualified expert, as Md. Code (2006, 2013 Repl. Vol.), § 3-2C-02(a) of the Courts and Judicial Proceedings Article ("CJ") required. KBE did not appeal this ruling, nor does it contest its validity now.

On April 23, 2013, KBE filed a new complaint against Specialized. Specialized moved for summary judgment, asserting that KBE's claims were barred by the terms of their contract and by limitations. The circuit court held a hearing and ruled that KBE's claims were time-barred because, pursuant to the Agreement, KBE was required to bring any claims against Specialized within three months from the date the Project was completed, without regard to the date the claims were discovered. In the alternative, the court found that limitations barred KBE's breach of contract, negligence, and negligent misrepresentation claims and that KBE's indemnification claims were precluded by the Agreement, which did not entitle KBE to indemnity. The circuit court memorialized its ruling in an order on July 10, 2014, and KBE noted a timely appeal.

II. DISCUSSION

KBE's detailed appellate questions[2] boil down to the assertion that the circuit court erred in granting summary judgment to Specialized. KBE's arguments turn largely on its

[2] KBE presents the following questions for our review:

> 1. Did the court below err in granting summary judgment to Specialized by holding that articles 1.2 and 7 of the expressly dominant KBE Subcontract Form did not "prevail" over the non-dominant Specialized Form's paragraph 19, which the court thus misapplied as (1) requiring KBE to make its contingent third-party claims within just 90 days of completion of the work, even though the Owner did not discover the problem and file suit against KBE until almost 18 months later, and (2) capping any recovery of damages that KBE might suffer at the $63,000 price for Specialized's work?
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> a) Did the court below err in holding that the dominant KBE Subcontract Form's article 1.2 – which states that, "[i]f there is any conflict in language between this [KBE] contract agreement and the aforementioned [Specialized] proposal . . . , the language of this contract agreement shall prevail" – did not protect the broad indemnification provisions of article 7 of the KBE Form from the admittedly "sweeping" remedy-limiting "language" of paragraph 19 of the Specialized Form?
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> b) Did the court below err in holding that the "sweeping" remedy-limiting "language" of paragraph 19 of the non-dominant Specialized Form was not in "<u>any</u> conflict" with the broad "language" of article 7 of the dominant KBE Form, which states that, "[t]o the fullest extent permitted by law, [Specialized] shall indemnify and hold harmless [KBE] from all claims . . . arising out of or resulting from the performance of the Work . . . (i) is attributable to property damage . . . or loss of use resulting therefrom . . . (ii) is caused in whole or in part by any negligent act or omission of the Subcontractor?" (continued…)

(…continued)

c) Given the clear "conflict" here, did the court below err in failing to limit the reasonable meaning of paragraph 19 of the Specialized Form to performance-related claims arising from change orders, rejection of work, and non-performance, while excluding the indemnity and contribution claims at issue here?

d) Did the court below err in holding that indemnity under the KBE Form's article 7 for "property damage" and "loss of use resulting therefrom" did not include physical injury, diminution in value and loss of use sought in a building Owner's claim against KBE arising from Specialized's negligent inspection of [the] defective masonry work and resulting multi-year repairs costing $1.4 million?

e) Did the court below likewise err in holding that the admittedly "sweeping" remedy-limiting terms of the Specialized Form's paragraph 19 were not in conflict with the provision of the dominant KBE Form that the express contractual-indemnity obligation of article 7 "shall not be construed to negate, abridge or otherwise reduce any right or obligation of indemnity which would otherwise exist" under governing law?

f) Did the court below err in holding that it was neither "unconscionable" nor otherwise legally "unreasonable" for [] Specialized as a professional engineering entity [to] impose on its structural inspection proposal a provision that claims against it must be filed within the three-month period after completion of its work and that related damages are capped by the contract price?

2. Did the court below also err in alternatively granting summary judgment under the statutory three-year limitations period, on the theory that KBE's claim against its subcontractor accrued at the same time as the Owner's claim against KBE, despite settled case law that indemnity and contribution claims against subcontractors (continued…)

contention that the Agreement comprised the parties' contract and that the Agreement's highly pro-KBE terms trumped the highly pro-Specialized terms in the Proposal. This would seem to tee up a battle between the parties' contract forms. Ultimately, though, we need not get there, because we hold instead that (1) Counts I, II, and III were barred by the general three-year limitations period that would apply if, as we assume, the parties' contract didn't shorten it; (2) Count IV was precluded by the Agreement, which did not provide KBE with the contractual right to seek indemnification for economic loss damages arising from Specialized's negligence; and (3) Counts V and VI were conceded by KBE in opposing Specialized's motion for summary judgment.

Our task in reviewing the grant of a motion for summary judgment is to determine "whether the trial court's grant of the motion was legally correct." *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152-53 (2008) (citations omitted). A motion for summary judgment is properly granted if "there is no genuine dispute as to any material fact and [] the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). When "the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party." *Laing*, 180 Md. App. at 153 (citations omitted).

(…continued)

do not accrue for limitations purposes until the contractor has settled or otherwise paid the Owner's claim?

A. Counts I, II, And III Were Barred By Limitations.

Ordinarily, "[a] civil action at law shall be filed within three years from the date it accrues." CJ § 5-101. In Maryland, the general rule is that a cause of action accrues upon the occurrence of the alleged wrong. *Poffenberger v. Risser*, 290 Md. 631, 634 (1981). One exception is the "discovery rule," which "tolls the accrual date of the action until such time as the potential plaintiff either discovers his or her injury, or should have discovered it through the exercise of due diligence." *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 131-32 (2011) (citations omitted). And parties also can agree, within limits, to modify the statutory limitations period. *See Millstone v. St. Paul Travelers*, 183 Md. App. 505, 514 (2008), *aff'd*, 412 Md. 424 (2010) ("[P]arties may agree to a provision that modifies the limitations result that would otherwise pertain provided (1) there is no controlling statute to the contrary, (2) it is reasonable, and (3) it is not subject to other defenses such as fraud, duress, or misrepresentation." (internal quotation marks and citation omitted)); *Coll. of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc.*, 132 Md. App. 158, 169 (2000) ("Such contractual modifications are generally not disfavored in the law [because they] are supported by the public policy in favor of parties' freedom to contract.").

Much of the briefing and argument in this case, both in the circuit court and here, has revolved around the question of whether the parties' contract altered the statutory limitations period. To answer that question directly, we would need to determine what the parties' contract says in this regard, and before that to determine what terms and provisions, if any, survived the parties' Battle of the Boilerplate. The circuit court resolved the Battle

in Specialized's favor when it found that Paragraph 19 in Specialized's Proposal—and its draconian three-month claim period—applied, and barred all of KBE's claims, because nothing in KBE's Agreement contradicted (and thus superseded) it. But the circuit court held in the alternative that KBE's breach of contract, negligence, and negligent representation claims were barred by the full three-year limitations period, and disagreed with KBE's characterization of those claims as "indemnity" claims. And because we agree with the court's alternative analysis, we need not parse the contracts for the purpose of defining the limitations period.

Instead, we assume for present purposes that the full statutory three-year limitations period applied to Counts I, II, and III of KBE's Complaint. These counts allege, respectively, that Specialized (1) breached the Agreement, (2) performed its inspection services negligently, and (3) misrepresented to KBE that there were no defects in the Project's structural work. None of these claims seeks indemnification—they arise out of the work Specialized performed on the Project on behalf of KBE and seek to recover damages owed directly to KBE. They are not contingent, in whole or in part, on any claims Waldorf might have had or won against KBE.[3] And we know that these claims accrued

[3] By contrast, Count IV of KBE's Complaint alleges that KBE is entitled to indemnity for the damages it incurred in settling Waldorf's claims as a matter of contract. Unlike Counts I, II, and III, Count IV was predicated upon a future event that might not have occurred—an adverse judgment entered against KBE in favor of Waldorf. Consequently, this claim did not ripen until after KBE settled Waldorf's claims and paid Waldorf the settlement. *See Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*, 143 Md. App. 698, 712-14 (2002) (holding that an indemnity suit maintained by condominium developers against building contractors was not ripe until after an adverse judgment was entered against the developers by the condominium association).

no later than May 8, 2009 because it is undisputed that Waldorf informed KBE about the defects in the Project on that date, thereby putting KBE on notice of potential claims against those involved in constructing the Project or inspecting their work. Measured from that date, Counts I, II, and III of KBE's Complaint, which were not asserted until April 23, 2013, are late by nearly a year.

B. The Agreement Does Not Provide KBE With A Contractual Right To Pursue Indemnification For The Expenses Incurred In Repairing The Property.

Count IV of KBE's Complaint alleges that, pursuant to Article 7 of the Agreement, KBE had an express contractual right to indemnity for the expenses it incurred in settling Waldorf's claims:

> To the fullest extent permitted by law, [Specialized] shall indemnify and hold harmless [KBE] 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 damage, loss or expense (1) is attributable to property damage, bodily injury, sickness, disease or death or loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of [Specialized].

Specialized counters that KBE is not entitled to indemnity under Article 7 because the expenses KBE incurred in remedying the defects Waldorf discovered in the Project were not "attributable to property damage, bodily injury, sickness, disease or death or loss of use resulting therefrom." We agree.

In interpreting the Agreement, we *first* ascertain whether its contents are ambiguous, *i.e.*, susceptible to more than one interpretation by a reasonable person. *Dumbarton Imp. Ass'n, Inc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 53 (2013). We bear in mind that the

Agreement "must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that [we] will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Id.* at 52 (citations omitted). If we determine the language is unambiguous, we "simply give effect to that language" and the Agreement's "unambiguous language will not give way to what the parties thought [it] meant or intended it to mean at the time of execution." *Id.* at 51-53 (citations omitted). On the other hand, if we determine that the language is ambiguous, we look to extrinsic evidence to divine the purpose of the Agreement and the intent of the parties. *Id.* at 54.

By its plain language, Article 7 entitles KBE to seek indemnification from Specialized for damages arising out of Specialized's work on the Project so long as—and this is the key—the damages are "attributable to property damage, bodily injury, sickness, disease or death or loss of use resulting therefrom." There is no suggestion that Specialized's alleged failure to perform inspection services caused physical injury, sickness, disease, or death to anyone. So KBE's ability to pursue contractual indemnification turns on whether the expenses it incurred in remedying the defects in the Project qualify as "property damage" as the term was used in Article 7.

They don't. Instead, KBE's losses here are economic losses. In the construction context, we have long distinguished claims for economic loss from claims for bodily injury and physical damage to property other than the building itself. *See Heritage Harbour, L.L.C.*, 143 Md. App. at 706-07 (citation omitted); *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18, 33 (1986). In particular, we have

held that a contractor may only be held liable in tort for damage to property other than the building at issue. *See Heritage Harbour, L.L.C.*, 143 Md. App. at 707 ("It is generally said that a contractor's liability for economic loss is fixed by the terms of his [or her] contract. Tort liability is in general limited to situations where the conduct of the builder causes an accident out of which physical harm occurs to some person or tangible thing other than the building itself that is under construction." (citation omitted)). "The difficulty lies in determining whether an injury constitutes physical harm to property for which tort liability will lie, or mere economic loss." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 737 (2007), *aff'd*, 403 Md. 367 (2008). But as a general rule, "[e]conomic losses include such things as the loss of value or use of the [building] itself, the cost to repair or replace the [building], or the lost profits resulting from the loss of use of the [building]" and will not be recoverable in tort while physical harm to *property other than the building itself* will be recoverable in tort. *See id.* (citation omitted).

The damages KBE seeks here fall squarely into the definition of economic loss and outside the definition of property damage. KBE alleges that Specialized failed to inspect the structural work KBE performed on the Project properly, as it agreed under the Agreement, and that this failure caused the Project to suffer substantial latent defects. KBE is a sophisticated party that was represented by able counsel throughout, and its form limited its right to seek indemnity to the categories set forth in Article 7 (unlike Specialized's indemnification provision, which reserved the right to seek indemnity for a much broader array of losses, including "loss of use, loss of profit, … and for any and all other losses and damages, tangible and intangible, alleged to arise out of or result from any

of the work performed or not performed under the Agreement…."). The circuit court correctly granted summary judgment in favor of Specialized on Count IV.

C. KBE Conceded Its Remaining Claims.

In its remaining claims, Counts V and VI, KBE alleged that Specialized had an implied-in-law obligation to indemnify KBE for the expenses incurred in repairing the Project or, alternatively, that KBE was entitled to contribution from Specialized because they were joint tortfeasors.

As to the former, the Court of Appeals has recognized that there are circumstances under which a party may be entitled to an implied, equitable right to indemnity:

> Finally, the right may be an equitable one implied by law. In *Franklin v. Morrison*, 350 Md. 144, 154 (1998), we observed that this . . . form of indemnity, which we characterized as tort indemnity, may exist between persons liable for a tort. We said that the basis of it "is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." *Id*, quoting from Restatement (Second) of Torts, § 886B cmt. c. (1979). The tort-based right is articulated as well in § 96 of the Restatement of Restitution: "A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability."

Pulte Home Corp., 403 Md. at 382-83. But during the June 16, 2014 hearing on Specialized's motion for summary judgment, KBE abandoned this claim:

> This particular contract expressly reserved, reserves the full rights under the common law. One of which is this implied right of indemnity. It's an implied contractual right because of the contractual relationship we have with Specialized, rather than an implied tort indemnity, like in [*Franklin*, 350 Md. 144], which is discussed in the briefs, but is, is not on point here.

Instead, KBE appeared to assert that it had an implied-by-fact right to indemnity based on the contractual relationship it had with Specialized. "A right of indemnity implied in fact may arise from a special relationship between the parties, usually contractual in nature, or from a course of conduct." *Pulte Home Corp.*, 403 Md. at 382. However, "not every contractual relationship will produce an implied indemnity [and] . . . 'a contractual right to indemnification will only be implied when there are unique special factors demonstrating that the parties intended that the would-be indemnitor bear the ultimate responsibility . . . or when there is a generally recognized special relationship between the parties.'" *Id.* (quoting *Araujo v. Woods Hole, Martha's Vineyard, Etc.*, 693 F.2d 1, 2-3 (1st Cir. 1982)). KBE never pled such a claim in the Complaint, nor did it ever plead that there were "unique special factors demonstrating that the parties intended that [Specialized would] bear the ultimate responsibility" for the work performed on the Project. So to the extent KBE believed it was entitled to indemnity from Specialized based a special relationship between the parties, it was required to plead that relationship and could not raise it for the first time in opposition to Specialized's motion for summary judgment.

KBE also has abandoned Count VI, in which it asserted it was entitled to contribution based on its joint tortfeasor relationship with Specialized. In the Complaint, KBE alleged that "[t]o the extent that *Specialized and KBE* are determined to be joint tortfeasors . . . KBE is entitled to contribution from Specialized." (Emphasis added.) In opposing Specialized's motion for summary judgment, though, KBE conceded that it lacked a joint tortfeasor relationship with Specialized:

> KBE alleges contractual and/or tort "contribution" from [Specialized] from the standpoint of [Specialized's] having joint or several liability with former third-party co-defendant Construction Services of NC, Inc. ("CSNC"), *not in some "joint tortfeasor" role with KBE itself.*

(Emphasis added.) Instead, KBE sought to establish that it was entitled to contribution based on Specialized's joint tortfeasor relationship with another subcontractor that worked on the Project. And since that theory of contribution was not pled in the Complaint, it suffers the same fate.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.