Docket #0097 Date Filed: 1/21/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re: WELDED CONSTRUCTION, L.P., et al. *et al,* Debtors and Debtor in Possession.	Chapter 11 Case No. 18-12378 (KG) (Jointly Administered)
WELDED CONSTRUCTION, L.P., Plaintiff, **v.** PRIME NDT SERVICES, INC., Defendant.	Adversary Proceeding Adv. Pro. No. 19-50180 (KG)

PRIME NDT SERVICES, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT

Defendant, Prime NDT Services, Inc. ("Prime"), through counsel, opposes the Motion for Leave to Amend the Complaint filed by Welded Construction, L.P. and Welded Construction Michigan, LLC (collectively "Welded") as follows:

I. INTRODUCTION

1. Welded has filed a Motion for Leave to Amend the Complaint well after the close of discovery, and on the same date that Prime filed its Motion for Partial Summary Judgment and associated Motions *in Limine*. Welded now seeks to recover its attorneys' fees, which is a matter of interpretation of the subcontract between Welded and Prime ("the Subcontract"), and which Welded never sought throughout the entirety of this litigation, which is now on the eve of trial.

2. Welded's proposed amendment is futile. The attorneys' fees provisions of the

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Subcontract unequivocally deal with third party claims. They contain notice and defense provisions that would make no sense in the context here, where Welded is seeking to enforce liability under its own contract.

3. Even if Welded's proposed amendment was colorable – which it is not -- this was an issue to be addressed in discovery. But discovery is closed, and Prime was never on notice that Welded was seeking to recover attorneys' fees, or that it would attempt to advance its faulty interpretation of the Subcontract at trial. This is real prejudice. It is patently unfair to allow Welded to spring this new theory of recovery, liability, and contractual interpretation on Prime, on the eve of trial.

II. CONCISE STATEMENT OF FACTS

A. Procedural History

4. Welded filed its Complaint on March 27, 2019, over nine months ago. The Complaint contains absolutely no reference to the recovery of attorneys' fees. *See* D.I. 1.

5. Since the Complaint was filed, nearly every meaningful trial deadline elapsed, multiple times. This case is on its fourth applicable trial scheduling order, and the discovery deadline has come, went, come again by amendment, and went again. Most recently, the discovery closed on December 16, 2019.

6. The deadline to seek leave to amend expired seven days following the adjudication of Prime's Motion for Partial dismissal, August 20, 2019;

7. In the meantime, discovery ensued, and was completed. The individuals who would speak on the issue of the interpretation of the Subcontract were deposed. Questions regarding the interpretation of the Subcontracts provisions regarding attorneys' fees were not inquired into because they were not at issue in the Complaint. Prime can no longer inquire into

these issues in discovery as a direct result of Welded's delay.

B. The Subcontract

8. The Subcontract between Welded and Prime contains two provisions that reference the collection of attorneys' fees. First, there is a general indemnification statement relative to Prime's duty to indemnify Welded:

> 14.0 Subcontractors Obligation and Indemnification
>
> TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR AGREES TO INDEMNIFY, DEFEND, RELEASE AND HOLD HARMLESS CONTRACTOR; COMPANY, THEIR PARENT AND AFFILIATE COMPANIES, PARTNERS, LIMITED PARTNERSHIPS IN WHICH COMPANY, ITS PARENT AND/OR AFFILIATED COMPANIES ACT AS GENERAL PARTNER, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, INSURERS, AGENTS AND EMPLOYEES (COLLECTIVELY "COMPANY INDEMNITIEES") FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS LOSSES, DAMAGES, CAUSES OF ACTION, SUITS AND LIABILITIES OF EVERY KIND, INCLUDING ALL EXPENSES OF LITIGATION, COURT COSTS, AND ATTORNEY'S FEES FOR INJURY TO OR DEATH OF ANY PERSON, OR FOR LOSS OF DAMAGES (EXCLUDING PUNITIVE AND EXEMPLARY) TO ANY PROPERTY (INCLUDING WITHOUT LIMITATION, CLAIMS FOR POLLUTION AND ENVIRONMENTAL DAMAGE), PRODUCT LIABILITY AND STRICT LIABILITY AND CIVIL OR CRIMINAL FINES OR PENALTIES, DISCOVERED OR UNDISCOVERED, DIRECTLY OR INDIRECTLY ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY INCIDENTAL TO (I) ANY BREACH OR NON-COMPLIANCE WITH ANY TERM OR PROVISION OF THIS AGREEMENT, BY THE SUBCONTRACTOR, ITS EMPLOYEES, ITS SUBCONTRACTORS, VENDORS, AGENTS REPRESENTATIVES, ASSIGNS, SUCCESSORS, AFFILIATED COMPANIES, OR ANY OTHER PERSON FOR WHOM THE SUBCONTRACTOR IS RESPONSIBLE IN THE LAW, RELATED TO THIS AGREEMENT OR THE PERFORMANCE OF NON-PERFORMANCE OF THE WORK HEREUNDER (COLLECTIVELY "CONTRACTOR'S LIABILITIES"). THIS INDEMNITY INCLUDES SUBCONTRACTORS AGREMENT TO PAY ALL COSTS AND EXPENSES OF DEFENSE,

> INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEY'S FEES INCURRED BY ANY CONTRACTOR OR COMPANY INDEMNITIEE.
>
> […]
>
> Contractor shall notify Subcontractor of any claim that has given or could give rise to a right of indemnification hereunder or that may be presented to it by any party. Subcontractor shall, at its sole cost and expense, investigate, handle, respond to, and provide defense for any claim for which it gives indemnity herein; provided that Contractor shall have the right and opportunity to participate in any such investigation and defense. At Contractor's sole discretion and option, exercisable at any time, Contractor may itself undertake the defense, litigation, settlement or satisfaction of any such claim, reserving the right to seek indemnification against Subcontractor until after the claim is resolved, or Contractor may direct Subcontractor to contest, defend, litigate, settle or satisfy any claim made against Contractor provided that Subcontractor shall not settle any claim without Contractor's prior written consent, such consent not to be unreasonably withheld. In the event the Subcontractor, after receipt of notice of a Claim, fails to furnish a defense and indemnity as provided for under this provision, the Contractor shall be entitled to receive from the Subcontractor its attorney's fees, costs, expenses and any amounts paid in the enforcement of this Agreement.

9. The Subcontract also contains a further indemnity provision, relating to the parties' duties with respect to insurance:

> If any action or proceeding is commenced to enforce the rights of the CONTRACTOR as an additional insured under this Subcontract, and the CONTRACTOR prevails in that action, the SUBCONTRACTOR and/or its insurer agrees to pay, in addition to any other relief granted, the actual reasonable attorneys' fees which the prevailing party has paid or is obligated to pay and all costs and expenses, not merely recoverable costs, which the prevailing party has paid or is obligated to pay. This provision is independent and severable from any other provision of this Subcontract and shall be enforceable as a separate agreement.

10. There is nothing in the Complaint that pertains to Welded's status as an additional insured under any insurance policy of Prime. *See generally,* D.I. 1.

III. LEGAL ARGUMENT

A. Legal Standard

11. A plaintiff is permitted to amend its pleadings "as a matter of course" within 21 days after service of a responsive pleading or a motion under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1)(B). Where, as here, a plaintiff seeks to amend its complaint outside this window, it may do so only with the defendant's written consent or the Court's leave. Fed. R. Civ. P. 15(a)(2). The Court should deny leave to amend if there is evidence of undue delay or if the amendment would be futile. *Koken v. GPC Int'l, Inc.*, 443 F. Supp. 2d 631, 633 (D. Del. 2006). "Delay may become 'undue' when a movant has had previous opportunities to amend a complaint." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001). Undue delay requires examining "the movant's reasons for not amending sooner." *Id*.

12. An amendment is futile "if it is frivolous, fails to state a claim upon which relief can be granted, or advances a claim or defense that it legally insufficient on its face." *Koken*, 443 F. Supp. 2d at 634 (citations omitted). The standard for futility under Rule 15(a) is the same as the standard of legal sufficiency for Rule 12(b)(6). *Intellectual Ventures I LLC v. Toshiba Corp.*, No. 13-453-SLR-SRF, 2015 WL 4916789, at *2 (D. Del. Aug. 17, 2015) (citing *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000)). Thus, an amended pleading would be futile if it fails to state a claim upon which relief can be granted after the district court "take[s] all pleaded allegations as true and view[s] them in light most favorable to the plaintiff." *Id.* (quoting *Winer Family Trust v. Queen*, 503 F.3d 319, 331 (3d Cir. 2007)). However, when evaluating a motion to dismiss on the basis of Section 101, a court is "not required to credit bald assertions or legal conclusions improperly alleged in the complaint." *IPA Techs., Inc. v. Amazon.com, Inc.*, 352 F. Supp. 3d 335, 342 (D. Del. 2019) (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 331 F.3d 198, 216 (3d Cir. 2002)).

Moreover, “factual allegations in the complaint that contradict the specification or the claims need not be credited as true.” *Id*. at 343 (citing *Aatrix*, 882 F.3d at 1125).

B. The Proposed Amendment is Futile

13. As a threshold matter, Welded’s proposed amendment fails as a matter of law because the Subcontract does not provide for the recovery of attorneys’ fees to enforce the Subcontract. The Subcontract contains an indemnity provision requiring Prime to pay attorneys’ fees in conjunction with third party claims. This is evident from the text of the indemnity provision, which contains clear language governing the parties’ conduct in the event of a claim or suit. That is not this case here, and Welded has no resulting entitlement to attorneys’ fees.

14. In Pennsylvania, "[t]he construction of an indemnity contract is a question of law for the court to decide." *Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.*, 264 F.3d 365, 371 (3d Cir. 2001) (citing *Hutchison v. Sunbeam Coal Corp.*, 513 Pa. 192, 519 A.2d 385, 390 (Pa. 1986)). It is a "well-established principle . . . that an indemnity clause is to be construed against the party seeking indemnification." *See Jacobs Constructors, Inc.*, 264 F.3d at 371. "The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties." *Murphy v. Duquesne Univ. Of The Holy Ghost*, 565 Pa. 571, 777 A.2d 418, 429 (Pa. 2001). Moreover, "all provisions in the agreement will be construed together and each will be given effect because a court will not interpret one provision . . . in a manner which results in another portion being annulled." *Pac. Employers Ins. Co. v. Glob. Reinsurance Corp. of Am.*, 693 F.3d 417, 426 (3d Cir. 2012) (quoting *Lesko v. Frankford Hosp.-Bucks County*, 609 Pa. 115, 15 A.3d 337, 342 (Pa. 2011).

15. Indemnification agreements generally govern the shifting of liability with respect to third party claims. 41 Am Jur 2d Indemnity § 30. They do not however, generally extend to

costs and fees incurred in prosecuting an indemnification suit. *Id*. This is the case under Pennsylvania law, which applies to the Subcontract, as its highest court has explained, "only those expenses engendered by the *defense* litigation and not that portion allocable to the *indemnification* litigation may be recovered by the indemnitee." *Boiler Eng'g & Supply Co. v. Gen. Controls, Inc.*, 443 Pa. 44, 47, 277 A.2d 812, 814 (1971). Thus, while it is possible for parties to contract for "first party" indemnification, that is, where one party to an indemnification agreement requests indemnification from the other to enforce the agreement, there must be a "clear agreement of the parties." *Dansko Holdings, Inc. v. Ben. Tr. Co.*, 2019 U.S. Dist. LEXIS 195649, at *17 (E.D. Pa. Nov. 8, 2019) (citing *Trizechahn Gateway LLC v. Titus*, 601 Pa. 637, 976 A.2d 474, 483 (Pa. 2009)).

16. *Dansko* is particularly instructive here. There, Dansko agreed to the following indemnification provision:

> [Dansko] agrees to indemnify [BTC] and its directors, employees and officers against and from any and all claims, damages, expenses, liabilities and losses whatsoever (including, but not limited to, any and all expenses reasonably incurred in investigating, preparing for, defending, or responding to discovery requests or other requests for information relating to, any government investigations, litigation, arbitration or other proceedings, commenced or threatened, or any claim whatsoever, whether or not resulting in any liability), to which any or all of them may become subject under any applicable federal or state law or otherwise relating to [BTC]'s duties as Trustee." Read in context, that language does not cover Dansko's suit against BTC.

Dansko, 2019 U.S. Dist. LEXIS at *21.

17. BTC subsequently sued Dansko for breach of the contract, including for indemnification of attorneys' fees incurred in pursuing the breach of contract action. *Id*. at * 17-25.

18. In finding that BTC had not established a "first party" indemnity agreement, the

Eastern District of Pennsylvania noted that a "common sense reading of the entire indemnity provision makes clear that it was intended to cover only third-party claims." *Id*. at * 22. That was because it contained provisions governing the notice of claims and the assumption of defense, both of which are present here. Given the presence of these clauses, the Eastern District noted that it would be "absurd" to apply the indemnity provision to first-party claims, and that there was an "obvious intent" for the indemnity provision to cover only third party claims. *Id*.

19. The intent of the parties is even clearer here. That is because the Subcontract *does* contain a clear provision providing for Welded's recovery of fees in one, limited situation. That is only in the situation where Welded institutes litigation to "to enforce the rights of the CONTRACTOR as an additional insured under this Subcontract." Thus, Welded knew exactly how to craft a "first party" indemnification provision, and they did so, but only for situations that are not present here.

20. Thus, no fair reading of the Subcontract would lend to a situation where Welded is entitled to recover attorneys' fees for costs incurred in prosecuting this breach of contract action. If Welded intended the right to recover such fees, it could have included that right in its limited provision pertaining to the right to recover fees for the prosecution of a suit to determine its additional insured status. Welded did not do so, and its proposed Amended Complaint fails to state a claim upon which relief can be granted as a result.

C. Prime has Been Prejudice by Welded's Failure in Seeking Leave to Amend

21. Not only is Welded's interpretation of the Subcontract unreasonable, Welded is also attempting to assert it after the close of discovery and on the eve of trial. While Welded attempts to vaguely wave away the timing and content of its proposed amendment, the fact is that it Welded seeks to add a new measure of damages that was positively not included in its original Complaint.

22. This is not, as Welded claims, a situation where Welded is "clarifying" its intent to recover attorneys' fees. Welded never requested them in the first place. And the fact that the Subcontract was attached to the Complaint is of no moment because Welded never put Prime on notice of the fact that it would attempt to rely on its flawed reading of the Subcontract.

23. Prime is without recourse here. Even if Welded's reading of the subcontract was reasonable – which it is not – the individuals who could have spoken as to its meaning have already been deposed, including the individuals who drafted and negotiated the Subcontract. The meaning of the indemnity provisions was not inquired into because it was not at issue in this lawsuit. Thus, Prime has been totally deprived of its ability to conduct discovery with respect to Welded's new-founded claim.

24. Moreover, Welded gives essentially no explanation as to why it has delayed until after the discovery deadline to file this Motion. That is because there is no reasonable explanation. Welded has had the Subcontract all along, and it could have amended prior to or during discovery. It did not. Thus, there is no justifiable reason why Welded is seeking to amend its Complaint now, and granting leave to file the proposed amendment would cause Prime real prejudice. Welded's Motion should therefore be denied.

WHEREFORE, for the reasons set forth above, Defendant Prime NDT Services, Inc. respectfully requests that this Honorable Court deny Welded's Motion.

Prime NDT Services, Inc. does not consent to the entry of final orders or judgments by the bankruptcy court.

(Signature on Next Page)

Respectfully submitted,

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Dated: January 21, 2020

CERTIFICATE OF SERVICE

I certify that on this 21st day of January, 2020, I electronically filed the foregoing with the Court using the CM/ECF system, and served counsel below via the CM/ECF system.

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	)	Case No. 18-12378 (KG)
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WELDED CONSTRUCTION, L.P., Plaintiff,	)	Adversary Proceeding
	)	Adv. Pro. No. 19-50180 (KG)
v.	)	
PRIME NDT SERVICES, INC., Defendant.	)	

ORDER

AND NOW this ___ day of _____, 2020, upon consideration of Prime NDT Services, Inc.'s Opposition to the Motion for Leave to Amend the Complaint filed by Welded Construction, L.P. and Welded Construction Michigan, LLC, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

_____
J.