

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**SOARING EAGLE LODGE MASTER
ASSOCIATION, INC., a West
Virginia non-profit corporation;
and SOARING EAGLE LODGE
ASSOCIATION, INC., a West
Virginia non-profit corporation,**

Plaintiffs,

vs.

**Civil Action No.: 15-C-2202
Presiding Judge Lorensen
Resolution Judge Matish**

FILED
2019 AUG 20 A 11:55
CATHY S. CUSHNETT
KANAWHA COUNTY CIRCUIT COURT

**SOARING EAGLE DEVELOPMENT
COMPANY, LLC, a West Virginia
limited liability company;
GBBN ARCHITECTS, INC., an Ohio
corporation; and BRANCH &
ASSOCIATES, INC., a Virginia
corporation**

Defendants,

And

**THE TRAVELERS INDEMNITY COMPANY
OF AMERICA, a Connecticut
corporation; and TRAVELERS PROPERTY
AND CASUALTY COMPANY OF AMERICA,**

Third-Party Defendant.

**ORDER GRANTING THIRD-PARTY DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court this 20th day of August 2019, upon Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America's Motion and Memorandum of Law for Summary Judgment. The Third-Party Plaintiff, Soaring Eagle Development Company, a West Virginia limited liability company,

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by counsel, Shawn P. George, Esq., and Third-Party Defendants, The Travelers Indemnity Company of America, a Connecticut corporation, and Travelers Property and Casualty Company of America, by counsel, Andrew "Jack" Smith, Esq., have fully briefed the issues necessary. Whereupon the Court heard oral argument from both parties pertaining to the instant motion, the Court grants the request and concludes and finds as follows:

FINDINGS OF FACT

1. This case was commenced with the filing of the Complaint in December 2015, wherein Plaintiffs Soaring Eagle Lodge Master Association, Inc., and Soaring Eagle Lodge Association, Inc., filed a Complaint against Defendant (and Third-Party Plaintiff) Soaring Eagle Development Company, LLC, (hereinafter "SEDC" or "Third-Party Defendant") asserting that SEDC caused certain structural and material defects in the Soaring Eagle Lodge at Snowshoe Mountain Resort in Snowshoe, Pocahontas County, West Virginia.
2. During the course of this litigation, an Amended Complaint was filed asserting claims against Branch & Associates, Inc., and GBBN Architects, Inc., the general contractor and architect for the Soaring Eagle Lodge, respectively, as well as multiple cross-, third-, and fourth- party claims against subcontractors, suppliers, and manufacturers, some of whom filed cross-claims and counterclaims against each other.
3. On or about November 20, 2017, SEDC filed an Amended Third-Party Complaint, against Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America (hereinafter "Third-Party Defendants" or "Travelers"), alleging breach of express contract (Count I); breach of

- implied contract (Count II); declaratory judgment (Count III); and unfair claims practices (Count IV).
4. On June 15, 2018, all parties in this action participated in mediation pursuant to the agreement of all parties and this Court's scheduling order, and settled their claims, with the "express agreement that SEDC preserved its right to pursue existing claims against The Travelers Indemnity Company of America and possibly Zurich (a non-party)". *See* Th. Pty. Defs' Mot., Ex. A, p. 4. Thereafter, the Court entered a Final Order Enforcing Settlement of All Claims. *See* Th. Pty. Defs' Mot., Ex. A.
 5. On May 8, 2019, Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America filed the instant Motion and Memorandum of Law for Summary Judgment, arguing the Court should enter summary judgment in its favor against all claims against it due to the fact that SEDC was provided a defense and indemnity. *See* Th. Pty. Defs' Mot.
 6. On May 29, 2019, Third-Party Plaintiff SEDC filed its Response of Soaring Eagle Development Company, LLC in Opposition to Travelers Indemnity Company of America and Travelers Property and Casualty Company of America's Motion and Memorandum of Law for Summary Judgment, arguing against the entry of summary judgment. *See* Th. Pty. Pl's Resp.
 7. On June 7, 2019, Travelers filed their Third-Party Defendants' Reply Brief in Support of Their Motion for Summary Judgment.
 8. On June 19, 2019, a hearing was held on the instant motion.
 9. The Court now finds the issue is ripe for adjudication.

STANDARD OF LAW

Motions for summary judgment are governed by Rule 56, which states that “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987). Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted). However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’ *Id.* at 60.

CONCLUSIONS OF LAW

As an initial matter, the Court notes that it held this motion for a period of no less than thirty (30) days following the hearing, wherein it was discussed that the undersigned's brother was a former law partner of counsel for SEDC. Whereas, it was discussed during oral argument that the name of the brother of the undersigned still appears on the firm letterhead for counsel for SEDC. Counsel for SEDC advised the Court during oral argument that the brother of the undersigned does some contract or consulting work from time to time for counsel for SEDC's firm, but that he has no financial interest in this particular case. Opposing counsel stated no objection to this, and the Court advised it would hold the motion for period of time so that counsels could confirm the same with their clients. There being no objections provided to the Court, and noting the agreement of counsel at the hearing on the motion as to the issue, the Court now rules on the instant motion.

In this matter, Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America argue summary judgment in their favor should be granted because SEDC was defended by insurers throughout this litigation, and that Travelers permissibly subcontracted any duty to defend to Brach & Associates, Inc. *See Th. Pty. Defs' Mot.*, p. 1-3. SEDC, on the other hand, argues that the motion is premature, Travelers owed SEDC defense and indemnity, it never excused Travelers from that obligation. *See Th. Pty. Pl's Resp.*, p. 12-14.

"Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syllabus Point 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). Further, the West Virginia Supreme Court has enforced indemnity and

additional insured requirements. See *Marlin v. Wetzel Cty. Bd. of Educ.*, 212 W. Va. 215, 217, 569 S.E.2d 462, 464 (2002); *Valloirc v. Dravo*, 178 W. Va. 14, 357, S.E.2d 207 (1987).

The Court examines *State ex rel. State Auto Prop. Ins. Companies v. Stucky*, 239 W. Va. 729, 806 S.E.2d 160 (2017). In *Stucky*, Plaintiff sued a residential construction company for damage to their property resulting from its work on an adjacent property. *Id.* at 730, 161. In that case, Plaintiff filed a third-party complaint against its insurer, State Auto, alleging it delayed in investigating the claim, settling the lawsuit and indemnifying Plaintiff. *Id.*

Importantly, in *Stucky*, the West Virginia Supreme Court of Appeals reasoned:

Under the terms of the commercial general liability policy issued by State Auto, the insured, CMD, was entitled to two things: a defense against the liability claim of the plaintiffs and indemnification of any damages within policy limits due to the plaintiffs as a result of CMD's alleged negligent act or omission.

...

The insured, CMD, was defended and indemnified by its insurer, State Auto, with respect to the lawsuit filed by the plaintiffs as required by the commercial general liability policy. A settlement was obtained at no cost to CMD, and no adverse judgment was entered in the circuit court. Consequently, this Court is of the opinion that, as a matter of law, CMD cannot maintain a first-party action against State Auto for common law and statutory bad faith and breach of contract.

Id. at 736, 167.

Further, the Court examines *Admiral Ins. Co. v. Fisher*, No. 17-0671, 2018 WL 2688182 (W. Va. June 5, 2018). The Court notes this is an unpublished, memorandum decision; however, as the parties have discussed and argued the case in detail, the Court analyzes the same. *Fisher* involved medical malpractice and wrongful death suits, including a declaratory judgment claims against insurer Admiral. *Id.* Admiral advised it would not afford coverage under the medical professional liability policy, but would afford a defense in the lawsuits on an interim basis. *Id.* at

*3. Admiral filed a counterclaim to rescind the policy based on the fact that the doctor allegedly made fraudulent misrepresentations in his insurance application. *Id.* at *1. In response, the respondents filed a cross-claim seeking a declaration that Admiral was required to afford coverage. *Id.* at *3. While the coverage litigation was pending, the parties settled the underlying lawsuits. *Id.*

In determining the issue of whether or not Admiral should have provided coverage, the West Virginia Supreme Court of Appeals importantly observed that the insured had cited no case in which the Court had held that an insured may recover *Pitrolo* damages where the insurer had both defended and settled the underlying case at no cost to the insured. *Id.* at *7-8.

The Court agrees with Travelers that it is entitled to summary judgment. In this case, SEDC has been defended by insurers for Branch's subcontractors throughout this litigation, up and through settlement. The Court considered the evidence proffered by SEDC, including the letters from various insurance providers indicating such providers agree to defend SEDC. *See* Th. Pty. Defs' Mot., Exs. Of particular importance to the Court is that SEDC was provided a valid defense at no cost to SEDC.

Like in *Stucky*, SEDC was provided a defense and indemnity throughout the litigation through settlement at no cost to SEDC. *See* Th. Pty. Defs' Mot., p. 8. The Court notes that in *Stucky*, the insurer, State Auto, was the named insured versus here where SEDC is listed as an Additional Insured on Travelers' policy issued to Branch. However, the result is the same, as the defense and indemnification was provided by successfully tendering and contracting the defense and indemnification to Branch's subcontractors in accordance with the parties' duly negotiated contracts.

Further, like in *Fisher*, SEDC had been defended to settlement at no cost to SEDC. The fact that SEDC was provided this defense and indemnification at no cost to it is an important common thread to the cases cited by the parties and the case at bar. The Court notes that Travelers did not agree to any interim indemnification or file a declaratory judgment claim, like in *Fisher*, but nonetheless, it caused SEDC to be provided an effective defense and indemnification at no cost to it by subcontracting or recasting the obligation to another downstream carrier pursuant to a valid contract.

A construction defect case, such as the one presented here, as with most complex commercial litigation, comes with reservations of rights and inevitable disputes over the nature of the loss extent of coverage. The Court interprets *Admiral* and *Stucky* to determine the actual loss to the insured party, not to dwell on arguments which were ultimately unsuccessful or abandoned. The question the Supreme Court directs the trial court to is whether the insured party was defended without incurring costs and was indemnified for any payment made to resolve the underlying claim.

The Court finds no genuine issue of material fact remains in this case based upon this coverage. If the other carriers, Cincinnati, Erie, or Liberty Mutual, believe their policies were excess to Travelers and wish to litigate that issue to recover their defense and indemnity payments, those issues would have to be resolved in a separate civil action. In other words, if insurance carriers disagree among themselves, it has no bearing on the fact that SEDC was defended and fully indemnified throughout this case.

This full defense and indemnity was provided by insurers for subcontractors as envisioned by the parties as expressed in their contractual agreements. The Court notes these are sophisticated parties who were negotiating a large-scale construction project at Snowshoe, and as

such, the Court considers the fact that they negotiated and contracted to such insurance obligations. *See Valloric v. Dravo Corp.*, 178 W. Va. 14, 15, 357 S.E.2d 207, 208 (1987)(Courts have enforced indemnity contract rights so long as they are not unlawful). The Court finds there is nothing inherently actionable with regard to an upstream insurer subcontracting or re-tendering a defense obligation downstream consistent with bargained-for, negotiated contractual obligations of the parties.

For all of these reasons, the Court finds that no genuine issue of material fact remains in the case at bar. Accordingly, Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America's Motion and Memorandum of Law for Summary Judgment must be granted.

CONCLUSION

It is hereby ADJUDGED and ORDERED that Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America's Motion and Memorandum of Law for Summary Judgment is hereby GRANTED. Summary Judgment is granted in favor of Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America and all of Third-Party Plaintiff, Soaring Eagle Development Company's claims against Third-Party Defendants The Travelers Indemnity Company of America and Travelers Property and Casualty Company of America are hereby dismissed.

There being nothing further to accomplish in this matter, the Clerk is directed to retire this matter from the active docket.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

Michael D. Lorensen, Judge
Business Court Division

8/22/19

Date: 8/22/19

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT

GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22
DAY OF Aug 2019

Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA