



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

Civil Action No. 16-C-7000

THIS DOCUMENT APPLIES TO THE FOLLOWING CASES:

Kenneth W. Carter

Civil Action No. 15-C-1791 KAN

v.

Cast & Baker Corporation, et al.

Robert L. Harrah II

Civil Action No. 15-C-1792 KAN

v.

Cast & Baker Corporation, et al.

Terry Letart, et al.

Civil Action No. 15-C-1793 KAN

v.

Cast & Baker Corporation, et al.

Deborah K. Harrah

Civil Action No. 15-C-1794 KAN

v.

Cast & Baker Corporation, et al.

Patricia A. Wolfe, et al.

Civil Action No. 16-C-1815 KAN

v.

Cast & Baker Corporation, et al.

**ORDER DENYING DEFENDANT CAST & BAKER CORPORATION'S
MOTION FOR SUMMARY JUDGMENT**

The Presiding Judges have reviewed and maturely considered *Defendant Cast & Baker Corporation's Motion for Summary Judgment* (Transaction ID 62259348), *Triad's Response in Opposition to Cast & Baker Corporation's Motion for Summary Judgment on Triad's Cross-Claims* (Transaction ID 62307136) and *Defendant Cast & Baker Corporation's Reply in Support of its Motion for Summary Judgment* (Transaction ID 62335491), and have considered the oral argument of counsel regarding the motion. Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously **DENY** the motion based on the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

FINDINGS OF FACT

1. In 2003, Yeager Airport undertook plans to construct a 500-foot extension of the 5 end of Runway 5-23 in order to create a Runway Safety Area. The runway extension is adjacent to part of Keystone Drive.

2. On March 12, 2015, the Runway Safety Area suffered a partial slope collapse.

3. On September 22, 2015, Kenneth W. Carter, Robert L. Harrah, II, Terry and Rosemary Letart, and Debora K. Harrah filed lawsuits against the Central West Virginia Regional Airport Authority (“Airport”), Triad Engineering, Inc. (“Triad”), and Cast & Baker Corporation (“Cast & Baker”) alleging they sustained personal injuries and property damage as a result of the March 12, 2015 partial collapse of the Mechanically Stabilized Earthen (“MSE”) slope at the end of Runway 5 at Charleston’s Yeager Airport. The Complaints all allege negligence against the Airport, Triad, and Cast & Baker.

4. On December 16, 2016, Patricia A. Wolfe and her son, Curtis Naylor, filed a nearly identical lawsuit.

5. Each of the complaints arose from alleged property damage and diminution in value of the Property Owner Plaintiffs’ property following the partial slope collapse and flooding in the Keystone Drive area.

6. In its Answers to these Complaints, Triad asserted Cross-Claims against Cast & Baker for contribution and express indemnification under Cast & Baker’s Contract with the Airport.

7. Triad’s express indemnification claims against Cast & Baker are based upon the language contained in the Standard Conditions of Cast & Baker’s Contract with the Airport.

8. The Standard Conditions of Cast & Baker's Contract states in section 6.20

Indemnification:

A. **To the fullest extent permitted by Laws and Regulations,** CONTRACTOR shall indemnify and hold harmless OWNER, ENGINEER, ENGINEER'S Consultants, and the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) **arising out of or relating to the performance of the Work, provided that any such claim, cost, loss or damage:**

1. is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom; **and**

2. **is caused in whole or in part by any negligent act or omission of CONTRACTOR,** any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by any negligence or omission of an individual or entity indemnified hereunder or whether liability is imposed on such indemnified person by Laws and Regulations regardless of the negligence by any such individual or entity.

* * *

C. The indemnification obligations of CONTRACTOR under paragraph 6.20A shall not extend to the liability of ENGINEER and ENGINEER's Consultants or to the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them arising out of:

1. the preparation or approval of, or the failure to prepare of approve maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or

2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

Cast & Baker Contract, ¶6.20, attached as Exhibit 5 to *Defendant Cast & Baker Corporation's Motion for Summary Judgment* (Transaction ID 62259348) (Emphasis added).

9. The Property Owner Plaintiffs' claims were mediated before the Mass Litigation Panel's Resolution Panel in April, 2017. This initial mediation was largely unsuccessful.

10. In August 2017, Triad negotiated a settlement with all Plaintiffs (including the Property Owner Plaintiffs) wherein Triad's professional liability carrier paid its remaining PLI policy limits and The Cincinnati Insurance Company paid \$150,000 to all Plaintiffs (including the Property Owner Plaintiffs). The Property Owner Plaintiffs received a portion of the settlement funds as evidence in the *Motion to Approve Settlement* (Transaction ID 61915545).

11. At the time of Triad's settlement, Cast & Baker was a party Defendant to the Plaintiffs' cases, was participating in the defense of the case, and was on notice of Triad's indemnity claims against it.

12. On October 17, 2017, the Court determined that reverse bifurcation of the Property Owner Plaintiffs' cases was appropriate with the damages-only aspect of these cases to be tried before any liability determination. See *Order Regarding Rulings Issued on October 17, 2017* entered on November 1, 2017 (Transaction ID 61308411) and *Case Management Order Regarding Damages Only Trial* entered on November 9, 2017 (Transaction ID 61341803).

13. On February 1-2, 2018, the Mass Litigation Panel's Resolution Judges reconvened mediation of all Property Owner cases, including the ones listed above. As a result of this mediation, with the exception of the *Johnson* case, a full settlement the Property Owner Plaintiffs' claims was reached as to all Defendants, which left Triad's express indemnification Cross-Claims against Cast & Baker as the only claim remaining in these cases.

CONCLUSIONS OF LAW

1. "Summary judgment is warranted if the available evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law.” W.Va. R.C.P. Rule 56; *Jochum v. Waste Management of West Virginia, Inc.*, 224 W.Va. 44, 48, 680 S.E.2d 59 (2009).

2. A contract that contains clear, unambiguous language should be applied and enforced according to its intent. Syl. Pt. 1, *Cottiga Development Company v. United Fuel Gas Company*, 128 S.E.2d 626, 628, (W.Va. 1962).

3. Under West Virginia law “if language in a contract is found to be plain and unambiguous, such language should be applied according to such meaning.” *FOP, Lodge No. 69 v. City of Fairmont*, 196 W.Va. 97, 101, 468 S.E.2d 712, 716 (1996). Furthermore, “contracts containing unambiguous language must be construed according to their plain and natural meaning.” *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161 (1995).

4. “A contract must be considered as a whole, effect being given, if possible, to all parts of the instrument.” Syl. Pt. 3, *Mun. Mut. Ins. Co. of W. Virginia v. Hundley*, 723 S.E.2d 398, 398 (W.Va. 2011).

5. “Accordingly, specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract.” Syl. Pt. 3, *Moore v. Johnson Serv. Co.*, 219 S.E.2d 315, 317 (W.Va. 1975).

6. Section 6.20A of the Construction Contract between the Airport and Cast & Baker expressly states that a claim must arise out of or relate to the performance of the work, and the damage must be caused in whole or in part by negligence of the Contractor. However, there was never a finding of liability on the part of Cast & Baker in any of the Keystone property owner cases.

7. It will not be determined until the liability trial, which is set to begin on March 4, 2019, whether Cast & Baker was negligent and, if so, whether that negligence was a proximate cause of the slope failure.

8. Further, it will not be determined until the liability trial whether Triad was negligent and if that negligence is related to activities that fall within the exception to Cast & Baker's indemnity obligation set forth in Paragraph 6.20.C of Cast & Baker's contract.

9. Likewise, the Court has not yet ruled upon whether or not Cast & Baker breached its contractual duty to Triad to hold it harmless from the claims raised by the Property Owner Plaintiffs by failing to provide Triad with a defense in those cases based upon the allegations raised against Triad in those cases.

10. The Court concludes genuine issues of material fact exist with respect to whether or not the indemnity provision of the Contract is triggered. It is premature to grant summary judgment in favor of Cast & Baker at this time because liability of the respective parties has not yet been determined. Therefore, Defendant Cast & Baker Corporation's Motion for Summary Judgment as to Triad Engineering, Inc.'s Cross-Claims is **DENIED** because a determination of liability is necessary under the plain and unambiguous language of the contract.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that *Defendant Cast & Baker Corporation's Motion for Summary Judgment* (Transaction ID 62259348) hereby **DENIED**. Any objections or exceptions to this Order are noted and preserved.

It is so **ORDERED**.

ENTER: February 4, 2019.

/s/ Derek C. Swope
Lead Presiding Judge
Yeager Airport Litigation