

13-0812

JNR SGT DIV ASM



RECEIVED

7-11-13

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

CREEKSIDE OWNERS ASSOCIATION,
a West Virginia not-for-profit homeowners
association, individually and on behalf of two
(2) or more unit owners,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-33(R)

SCHOOLHOUSE LIMITED LIABILITY
COMPANY, a West Virginia limited liability
Company; WIL-KEN, INC., a West Virginia
corporation; ELKINS BUILDERS SUPPLY
COMPANY, LLC, a West Virginia limited
liability company, BUILDERS GROUP, INC., a
West Virginia corporation; BG MILL WORK, INC.,
a West Virginia corporation; MINIGHINI
CONSTRUCTION, LLC, a West Virginia limited
liability company; SMITH BACKHOE AND
DOZER SERVICE, LLC, a West Virginia limited
liability company; R.E.H., INC., a West Virginia
corporation; DAVIS ELECTRICAL SERVICE,
INC., a West Virginia corporation; COOPER
ASHPALT, INC., a West Virginia corporation;
SOUTHERN STATES MARLINTON COOPERATIVE
INCORPORATED, a Virginia corporation, RELIABLE
ROOFING COMPANY, a West Virginia corporation,
RANDY KING, d/b/a Mountain Artisan Masonry;
BRUCE K. HOWELL, d/b/a BK Construction;
D'JERICO, L.L.C., a West Virginia limited
liability company; JOHN DOES 1-10; and
OLD SPRUCE REALTY AT SNOWSHOE, LLC,
a/k/a ReMax Old Spruce Properties, a West
Virginia limited liability company,

Defendants.

ORDER APPROVING SETTLEMENT AND
DISMISSING ALL CLAIMS AGAINST SETTLING DEFENDANTS

This matter comes before the Court pursuant to the "Joint Motion to Approve Settlement and Dismiss Claims" filed on June 17, 2013, by Plaintiff Creekside Owners Association ("COA") and its unit owners, and the "Settling Defendants," named as follows: Wil-Ken, Inc., Builders Group, Inc., BG Millwork, Inc., Smith Backhoe and Dozer Service, LLC, R.E.H., Inc.,

POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT

RECEIVED 7-9-13

by: CMC

Davis Electrical Service, Inc., Cooper Asphalt, Inc., Reliable Roofing Company, D'Jerico LLC, and Old Spruce Realty at Snowshoe, LLC. The Joint Motion informed the Court that the Settling Parties reached a settlement agreement after three days of mediation and through an arms-length negotiation. The Joint Motion asks this Court to find that the settlement agreement was executed in good faith and that all claims, including cross-claims, against the Settling Defendants are dismissed, with prejudice, from this action. The Joint Motion also asks that the Court dismiss any claims of the Plaintiff and its unit owners against Old Spruce personally, reserving only the claims of COA and its unit owners against Old Spruce to the extent that coverage applies to said claims under that policy issued to Old Spruce by CNA (Continental).

One non-settling defendant, Schoolhouse LLC, objects to the dismissal of the Settling Defendants. In its Response in Opposition to the Joint Motion, filed on June 26, 2013, Schoolhouse argues that the Plaintiff's claims against it are entirely derivative of the work performed by the Settling Defendants, and that its cross-claims against the Settling Defendants for implied indemnity should survive this Court's approval of the settlement agreement. Schoolhouse had previously also stated cross-claims for contribution against the Settling Defendants, but concedes that such claims are extinguished by the good faith settlement agreement. Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc., 182 W. Va. 597 (1990).

In response, the Plaintiff argues that any cross-claim for implied indemnity asserted by Schoolhouse may not survive the approval of the settlement agreement, because the Plaintiff has raised separate, independent causes of action against Schoolhouse as the Developer and Declarant for the property at issue. During the hearing on June 28, 2013, counsel for the Plaintiff provided examples of claims raised against Schoolhouse that are unrelated to the work performed by the Settling Defendants.

First, the Plaintiff asserts that Schoolhouse, as developer, selected the type of roof materials that were to be used on the project. The Plaintiff alleges that the type of roof materials that Schoolhouse selected were improper for this application. While any claim for improper installation is being dismissed as part of the settlement, the independent claim against Schoolhouse regarding the selection of roof materials would remain and have no relation to the work performed by the Settling Defendants.

Additionally, the Plaintiff asserts that Schoolhouse, as developer, improperly directed

Cooper Asphalt regarding the thickness of the asphalt for the project. While any negligent workmanship claims against Cooper Asphalt are being dismissed as part of the settlement, the independent claim that Schoolhouse provided negligent instruction to Cooper Asphalt would remain and have no relation to the work of Cooper Asphalt.

During the hearing, Schoolhouse argued that it is entitled to the opportunity to prove its implied indemnity claim which, if successful, should allow it to recover its attorneys' fees and costs expended in the litigation. Schoolhouse argues that it is without fault and that it should be allowed to maintain its cross-claim for implied indemnity against the Settling Defendants in order to recover its attorneys' fees and costs incurred in defending this lawsuit.

The Settling Defendants argue that the implied indemnity claim filed by Schoolhouse against them is not fee-shifting in nature. As a result, if Schoolhouse is successful in establishing that it was without fault, there would be nothing for Schoolhouse to recover from the Settling Defendants on an implied indemnity claim. The Settling Defendants argue that they entered into a settlement agreement with the Plaintiff to buy their peace and to cease their litigation costs. The Settling Defendants explained that if they have to remain in the case to defend the implied indemnity cross-claim by Schoolhouse, the main purpose of their settlement with the Plaintiff would be undermined, which would result in a withdrawal of the settlement between the Plaintiff and the Settling Defendants.

Upon consideration of the record, the arguments of the parties, and applicable West Virginia law, the Court FINDS and CONCLUDES as follows:

The Plaintiff and its unit owners have reached a good faith settlement with the Settling Defendants, as a result of extended mediation and arms-length negotiation. Any claim for contribution asserted against the Settling Defendants is thereby extinguished.

As stated by our Supreme Court of Appeals in Dunn v. Kanawha County Bd. Of Educ., implied indemnity is an equitable remedy whereby a party seeking recover *has been required to pay damages* because of the actions of a third party. In Bowyer v. Hi-Lad, Inc., our Supreme Court set forth the requisite elements to be proven in an implied indemnity claim, as follows:

- (1) An injury was sustained by a third party;
- (2) For which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and
- (3) For which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and the indemnitee share."

216 W.Va. 634. Notably, no case law in this jurisdiction supports Schoolhouse's assertion that it would be entitled to recover attorneys' fees and litigation costs if it were successful in proving its implied indemnity claim against the Settling Defendants. Our Supreme Court has only made clear that a party must be *without fault* to seek implied indemnity. Sydenstricker v. Unipunch Products, Inc., Syl. pt. 2, 169 W. Va. 440 (1982).

This Court is of the opinion that this settlement agreement and competing claims for implied indemnity are unique, in that the settlement agreement extinguishes any claim for which the putative indemnitors could be held liable. The claims that would survive this Court's approval of the parties' settlement agreement allege independent conduct by the respective non-settling defendants. As such, any verdict rendered on the remaining claims cannot be attributed to the Settling Defendants, and it is not necessary for this Court to disapprove of the settlement agreement to allow Schoolhouse to prove that they are blameless. Should the non-settling defendants prevail on the remaining claims, their attorneys' fees are attributable only to defending claims asserted against them in their individual capacities. Following this Court's approval of the parties' settlement agreement, the non-settling defendants are exposed to liability only to the extent that a jury would apportion fault in accordance with W.Va. Code §55-7-24.

If the only claims raised against Schoolhouse were solely derivative of the work performed by the Settling Defendants, Schoolhouse's implied indemnity claim could survive the good faith settlement between the Plaintiff and the Settling Defendants. See Woodrum v. Johnson, 210 W. Va. 762 (2001). However, the Plaintiff has asserted independent claims against Schoolhouse that are not derivative of the work performed by the Settling Defendants. The Plaintiff's Amended Complaint does not assert any claims against Schoolhouse predicated upon imputed, strict or vicarious liability of Schoolhouse for the actions or omissions of the Settling Defendants. Therefore, Schoolhouse's potential liability, if any, must necessarily be predicated upon its own fault. As a result, this Court finds no legal basis to support Schoolhouse's position that its cross-claims for implied indemnity could remain active after the Plaintiff dismisses all of its claims against, and relating to work performed by, the Settling Defendants.

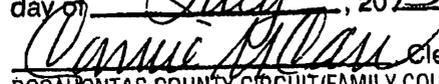
The Court is also mindful that "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation." *Id.* at 772, 917 (citations omitted).

WHEREFORE, for the reasons set forth above, the Court rules as follows:

1. The Joint Motion to Approve Settlement Agreement and Dismiss Claims is hereby **GRANTED**.
2. The claims of the Plaintiff and its unit owners against Wil-Ken, Builders Group, BG Millwork, Smith Backhoe, REH, Davis Electrical, Cooper Asphalt, Reliable Roofing and D'Jerico are hereby **DISMISSED, WITH PREJUDICE**. The claims of the Plaintiff and its unit owners against Old Spruce, personally, are **DISMISSED** but the Plaintiff and its unit owners preserve their claims against Old Spruce to the extent that said claims are or may be covered under that policy issued to Old Spruce by CNA (Continental).
3. All cross-claims asserted by or against Wil-Ken, Builders Group, BG Millwork, Smith Backhoe, REH, Davis Electrical, Cooper Asphalt, Reliable Roofing, D'Jerico and Old Spruce - Re/Max are **DISMISSED, WITH PREJUDICE**. The cross-claims of any non-settling defendants against Old Spruce, personally, are **DISMISSED** but the cross-claims of any non-settling Defendants against Old Spruce are preserved, to the extent only that Old Spruce is or may be covered under that policy of insurance issued to Old Spruce by CNA (Continental).
4. The Plaintiff and its unit owners and the Settling Defendants shall each be responsible for their own attorney fees and expenses pursuant to the settlement agreement reached between them, but this agreement shall not impact any claim by the Plaintiff or its unit owners against the non-settling Defendants for recovery of attorney fees or expenses.

The Circuit Clerk shall forward a copy of this Order to all counsel of record.

Entered on this 8th day of July, 2013.


James J. Rowe, Chief Judge
Eleventh Judicial Circuit, Certified this 10th
day of July, 2013

Clerk
POCAHONTAS COUNTY, CIRCUIT/FAMILY COURT
Marlinton, West Virginia, 24954

MR SGT DIV AS 8/12



8-16-13

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**REVISED ORDER APPROVING SETTLEMENT AND
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This matter comes before the Court pursuant to the "Joint Motion to Approve Settlement and Dismiss Claims" filed on June 17, 2013, by Plaintiff Creekside Owners Association ("COA") and its unit owners, and the "Settling Defendants," named as follows: Wil-Ken, Inc., Builders Group, Inc., BG Millwork, Inc., Smith Backhoe and Dozer Service, LLC, R.E.H., Inc.,

POCAHONTAS COUNTY
CIRCUIT/FAMILY COURT
RECEIVED 8/13/13
by: QMG/HPH

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The Court is also mindful that "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation." *Id.* at 772, 917 (citations omitted).

WHEREFORE, for the reasons set forth above, the Court rules as follows:

1. The Joint Motion to Approve Settlement Agreement and Dismiss Claims is hereby **GRANTED**.
2. The claims of the Plaintiff and its unit owners against Wil-Ken, Builders Group, BG Millwork, Smith Backhoe, REH, Davis Electrical, Cooper Asphalt, Reliable Roofing and D'Jerico are hereby **DISMISSED, WITH PREJUDICE**. The claims of the Plaintiff and its unit owners against Old Spruce, personally, are **DISMISSED** but the Plaintiff and its unit owners preserve their claims against Old Spruce to the extent that said claims are or may be covered under that policy issued to Old Spruce by CNA (Continental).
3. All cross-claims asserted by or against Wil -Ken, Builders Group, BG Millwork, Smith Backhoe, REH, Davis Electrical, Cooper Asphalt, Reliable Roofing, D'Jerico and Old Spruce - Re/Max are **DISMISSED, WITH PREJUDICE**. The cross-claims of any non-settling defendants against Old Spruce, personally, are **DISMISSED** but the cross-claims of any non-settling Defendants against Old Spruce are preserved, to the extent only that Old Spruce is or may be covered under that policy of insurance issued to Old Spruce by CNA (Continental).
4. The Plaintiff and its unit owners and the Settling Defendants shall each be responsible for their own attorney fees and expenses pursuant to the settlement agreement reached between them, but this agreement shall not impact any claim by the Plaintiff or its unit owners against the non-settling Defendants for recovery of attorney fees or expenses.
5. This Order is a final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure such that the time period for any appeal of this Order shall begin on the date of the entry of this Order.

The Circuit Clerk shall forward a copy of this Order to all counsel of record.

Entered on this 12th day of August, 2013.

A TRUE COPY, Certified this 13th
 day of August, 2013
Gene M. Cole, Clerk
 POCAHONTAS COUNTY CIRCUIT/FAMILY COURT
 Marlinton, West Virginia 24954
 By Gene M. Cole, Deputy

James J. Rowe
 James J. Rowe, Chief Judge
 Eleventh Judicial Circuit