35524

IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

MINDY AND BILLY MCCORMICK, et al.,

Plaintiffs,

v. **Civil Action Number 01-C-251**

WALMART STORES, INC., et al.,

Defendants,

and

RESOURCE CONSULTANTS AND DEVELOPERS, INC.,

Plaintiff,

v. **Civil Action Number 05-C-342**

BITUMINOUS CASUALTY CORPORATION,

Defendant.

ORDER

This matter is before this Court pursuant to the Plaintiff, Resource Consultants and Developers, Inc.'s (hereinafter "RCDI") Motion for Attorney Fees, Costs, and Post-Judgment Interest, filed on February 28, 2008. Bituminous Casualty Corporation (hereinafter "Bituminous") filed Bituminous Casualty Corporation's Response to RCDI's Motion for Attorney Fees, Costs and Post-Judgment Interest on March 3, 2008. RCDI filed a Reply to Bituminous's Response. The parties appeared before this Court on June 29, 2009, for a telephonic conference. RCDI appeared telephonically by counsel, Peter G. Zurbuch, and Bituminous appeared telephonically by counsel, John H. Polak. The parties stipulated the amount of attorney fees; however, there remains a dispute regarding

the indemnity clause and post-judgment interest. This Court has reviewed and considered the motion, memoranda and oral arguments of the parties, as well as the applicable law, and now makes the following findings, conclusions and ruling.

FACTUAL AND PROCEDURAL HISTORY

RCDI was hired as the general contractor for the construction of the Wal-Mart store in Lewisburg, West Virginia. RCDI then hired Davis & Burton Contractors, Inc. as a subcontractor to perform the site work and implementation of the on-site storm water management system. Davis & Burton acquired insurance from Bituminous. The contract between Davis & Burton and Bituminous contained an indemnification agreement.

The policy issued to Davis & Burton by Bituminous required Bituminous to defend the insured against any suit seeking damages because of bodily injury or property damage to which the insurance applies. After construction was complete, the downstream landowners, Billy and Mindy McCormick, sued Wal-Mart and RCDI. The complaint did not name Davis & Burton as a defendant, but did allege that the storm water management system constructed by Davis & Burton was causing the inundation. Thereafter, RCDI filed a third-party complaint against Davis & Burton, seeking indemnification from the claim.

This Court, by Order of June 13, 2006, dismissed the Plaintiffs' claims against RCDI based on the statute of limitations. RCDI did not incur any liability; however, legal fees were incurred in making a defense prior to the dismissal. By Order of June 16, 2006, this Court dismissed RCDI's claims against Davis & Burton, upon finding the evidence showed a flaw in the design of the storm water management system rather than a flaw in the construction. Subsequently, RCDI filed a Motion for Summary Judgment

seeking reimbursement from Davis & Burton's insurance provider, Bituminous, for the legal fees incurred by RCDI.

In an Order dated October 5, 2007, this Court partially granted RCDI's Motion for Summary Judgment. This Court found that the contract between RCDI and Davis & Burton was an insured contract. Thus, Bituminous owed RCDI a defense to the Plaintiffs' claims.

Bituminous filed a Motion for Reconsideration, arguing that RCDI's contract with Davis & Burton was not an insured contract and this Court erred in so finding. However, this Court denied the Motion for Reconsideration in the Order dated May 15, 2008. This Court held that Davis & Burton agreed to indemnify RCDI from and against any claims, including attorney's fees, arising out of or resulting from its construction of the storm water management system. This Court further found that by agreeing to insure RCDI against such claims, Davis & Burton's obligation to do so arose at the time the claim was made, because at that time it was impossible to determine the existence or lack of negligence by either party.

Additionally, this Court found that Bituminous should reimburse RCDI for the reasonable attorney's fees it incurred in making its defense to the Plaintiffs' claims. This Court did not set the amount of attorney's fees because the issue was not properly before the Court; however, the Order noted that if the parties could not agree to an amount, the Court would determine the amount upon a motion by either party.

RCDI then filed a Motion for Attorney's Fees, Costs and Post-Judgment interest, which is now before this Court.

ARGUMENT

RCDI argues that Davis & Burton Contractors (hereinafter "Davis & Burton") and RCDI intended the risk to be allocated to the insurance policy Davis & Burton had through Bituminous, evidenced by Davis & Burton entering into a contract with RCDI containing an indemnification clause which allocated RCDI's potential liability to Bituminous under Bituminous's policy. Because the parties contracted for risk shifting under the indemnification provision of the insured contract, this Court should give effect to the parties' contractual expectations and find that the indemnification clause, not the "other insurance" provision governs the risk allocation in this case.

RCDI also argues that it has been determined by this Court that an insured contract with an indemnification clause was in place between RCDI and Davis & Burton. The indemnification clause required Davis & Burton to indemnify RCDI for any claims arising out of or resulting from Davis & Burton's negligent work. Because the construction contract between Bituminous and RCDI contained an indemnification clause which entitled RCDI to coverage through the policy that Davis & Burton had with Bituminous, and because, as argued by Bituminous, both the RCDI policy and Bituminous's policy are primary, this Court should find that the entire loss should be shifted to Bituminous through the insured contract's indemnification clause regardless of the "other insurance" clauses.

RCDI alleges that finding that the entire loss should be shifted to Bituminous through the indemnification clause is consistent with the law of the Fourth Circuit and other jurisdictions.

Bituminous, on the other hand, argues that RCDI was defended in Civil Action 05-C-251 since the inception of that action by its own Commercial General Liability insurance carrier. Bituminous further argues that RCDI itself incurred no costs or expenses in that defense.

Bituminous alleges that because there are two liability policies that are applicable to the McCormick lawsuit, the Court is required to apply the "Other Insurance" clauses of both the Bituminous policy and RCDI's own policy, originally issued by USF&G. The "Other Insurance" clause of the Bituminous policy provides:

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverage A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance.
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in c. below.
>
> b. Excess Insurance
> This insurance is excess over any of the other insurance, whether Primary, excess, contingent or on any other basis:
>
> (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work."
>
> (2) That is Fire Insurance for premises rented to you; and
>
> (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

Bituminous further notes that RCDI's USF&G policy contains the identical "Other Insurance" provision, but also includes an endorsement which adds a subsection (4) to the subparagraph b "Excess Insurance" provision. This subsection provides:

> (4) When you have other insurance to apply on a primary basis for:

(a) Work or operations performed on your behalf; and

(b) Your acts or omissions in connection with the general supervision of such work or operations.

Bituminous maintains that the additional provision (4) in the USF&G policy does not apply in this case. The Defendant alleges that because none of the "Excess Insurance" provisions of either policy apply, both policies are considered to be primary. Both policies also contain identical "Method of Sharing" provisions which state, in pertinent part, that if all other insurance permits contribution by equal shares, that method will be followed. Under that approach, maintains Bituminous, each insurer contributes equal amounts until it has paid its applicable limits of coverage or none of the loss remains.

With regard to RCDI's request for post-judgment interest, Bituminous argues that RCDI cannot be entitled to post-judgment interest from October 2007 on any amount ultimately awarded in this action because no monetary judgment has yet been entered. Further, the parties disagree as to what the monetary amount should be, and this Court must resolve that disagreement. Until that has been done, argues Bituminous, West Virginia Code § 56-3-31(a) cannot apply.

ANALYSIS

In the Order of May 15, 2008, this Court denied Bituminous's Motion for Reconsideration. Specifically, this Court held that the contract between RCDI and Davis & Burton was an "insured contract" for the purpose of Plaintiffs' claim against RCDI, and that the insurance policy between Davis & Burton and Bituminous provides coverage of insured contracts, and therefore RCDI stood in the same shoes as Davis & Burton for coverage purposes against Plaintiffs' claim. Further, this Court found that the allegations

in the Plaintiffs' complaint triggered Bituminous's duty to defend its insured, which included RCDI.

The Order of May 15, 2008, also provided with regard to the indemnification clause,

> While the extent of indemnification might be limited, just as in *Marlin*, the contract at issue here clearly requires *some* level of indemnification and shifts *some* level of RCDI's potential tort liability to Davis & Burton. That level is determined by the amount of Davis & Burton's negligence. However, for nearly five years following Plaintiffs' claim, Davis & Burton's level of negligence was unknown.

The Order further held,

> As previously stated, Davis & Burton agreed to insure RCDI against *claims* arising out of or resulting from its construction of the storm water management system, and Plaintiffs' claim satisfies this requirement. By agreeing to insure RCDI against such claims, this Court finds that Davis & Burton's obligation to do so arose at the time the claim was made, because at that time it was impossible to determine the existence or lack of negligence by either party. The fact that Davis & Burton was ultimately found not to be negligent cannot alter its obligation to insure RCDI against Plaintiffs' claim from the time the claim was made until the time Davis & Burton was found to not be negligent.

As noted by the Plaintiff, the issue of whether an indemnity agreement controls the allocation of insurance and not the "other insurance" clause, is a novel issue in West Virginia. In *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 432 S.E.2d 98 (1993), with regard to indemnity agreements, our Supreme Court of Appeals held, "In *Riggle*, we held . . . Although it is true that under the indemnity provision [the indemnitor] could be held responsible for all damages to a worker even though only one percent negligent, appellant was expected to buy adequate insurance against this risk. Thus . . . contractual allegations of risk similar to the one before us are favored; certainly they are not contrary to public policy."

The Court stated:

> In our opinion, '[the indemnitee] is entitled to recover its attorney's fees from [the indemnitor] pursuant to . . . their contract. We see no public policy limitation against this result as [the indemnitor] seems to suggest. We are committed to the view that parties may contract as they choose so long as what they agree to is not forbidden by law or against public policy. [The indemnitor] contracted to pay [the indemnitee] attorneys' fees in certain situations, and we think the present situation falls fairly within the terms of that agreement. citing *Chesapeake & Potomac Tel. v. Sisson & Ryan* 234 Va. 492, 362 S.E.2d 723, 729 (1987),

In the instant case, this Court has previously determined that the indemnity clause in the contract between RCDI and Davis & Burton was proper. The indemnity agreement between the parties provided:

> To the fullest extent permitted by law, [Davis & Burton] shall indemnify and hold harmless [RCDI and its agents and employees] from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of [Davis & Burton's] work under this subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property . . . but only to the extent caused in whole or in part by negligent acts or omissions of [Davis & Burton], regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Now, this Court must determine whether the indemnity clause is controlling over the "other insurance" clauses in the two insurance policies in question. The Plaintiff cited *St. Paul & Marine Insurance Company v. American International Specialty Lines Insurance Company*, 365 F.3d 263 (2004), in which the United States Court of Appeals for the Fourth Circuit held that under Virginia law, indemnification provisions of an agreement controlled allocation of liability between primary and excess insurers, and allegedly conflicting "other insurance" clauses were irrelevant. Further, that Court held, "Further, all indications are that most, if not all, jurisdictions to have faced the question of whether an indemnification agreement could relieve particular insurers of an obligation to pay, without resort to a separate action to enforce the indemnification agreement, have answered in the affirmative."

In *American Indemnity Lloyds v. Travelers Property & Casualty Ins. Co.*, 335 F.3d 429 (2003), the United States Court of Appeals, Fifth Circuit, found that a subcontractor's commercial general liability insurer was liable for the full amount it paid in settling a personal injury action, notwithstanding the "other insurance" language in the policy, where the subcontractor had contractually agreed to indemnify the contractor against any and all claims for or on account of any injury to any person, and the contractor was an additional insured under the policy. In that case, there were two insurance policies. Each of the policies, as is in the instant case, had identical "other insurance" clauses.

The Court specifically found:

> "The general rule appears to be that, as AIL contends, where each of two liability insurance policies issued by different insurers provides primary coverage to the same insured in respect to the claim in question and contains mutually consistent "other insurance" provisions similar to those in the policies here, the insurer paying more than its share (generally either one half or the fraction that the limits of its policy is of the total of the limits of both policies) of the claim is ordinarily entitled to recover from the other insurer for the excess so paid." *Id.*

However, the *American* Court found an exception to this general rule. The Court determined that,

> However, the foregoing general rule is subject to an equally widely recognized exception for cases in which the policy of the insurer seeking to invoke the "other insurance" clauses also covers another insured who is liable to indemnify the insured in the policy of the other insurer. Thus, a well recognized commentator observes: "an indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy." *Id.* at 436.

Additionally, the Court held that the majority of jurisdictions recognizes the aforementioned exception and gives controlling effect to the indemnity obligation over

the "other insurance" or similar clauses, particularly where one of the policies covers the indemnity obligation.

The *American* Court also cited *J. Walters Const. Inc. v. Gilman Paper Co.*, 620 So.2d 219 (Fl.App.1993). In that case, Walters contracted with Gilman to perform construction work at a Gilman plant. The contract between the parties provided that Walters would hold Gilman harmless from any claims for injury arising from the work and would procure liability insurance covering Gilman. Walters procured insurance and listed Gilman as an additional insured. Gilman also procured its own insurance. After an employee was injured, a lawsuit was filed and a settlement was reached. Gilman paid the settlement and sued to recover from Walters's insurance the amount paid in settlement. Both policies covered the suit and had identical "other insurance" clauses. That Court determined, "We agree with Gilman that to apply the "other insurance" provisions to reduce CNA's liability would serve to abrogate the indemnity agreement between Walters and Gilman . . ." *Id.* at 221. The Court also noted that the agreement to hold harmless and indemnify Gilman was evidence of their mutual intent for the insurance of Walters to exclusively cover any claim arising out of the contracted work.

In the instant case, the parties entered into a contract containing an indemnification clause. This clause is evidence of the intent of RCDI and Davis & Burton to allocate RCDI's potential liability to Bituminous under its policy. In order to circumvent the indemnification clause, Bituminous cites *State of W.Va. Bd. Of Vocational Ed. v. Janicki*, 188 W.Va. 100, 102, 422 S.E.2d 822, 824 (1992), in which our Supreme Court of Appeals held that, "The unmistakable and valid objective of "other insurance" clauses is to limit or avoid a carrier's liability when risk coverage is

identical." Bituminous argues that because the coverages of the two policies at issue are identical, it should share liability with the other insurance company.

This argument set forth by Bituminous fails to consider the contractual obligations agreed to by RCDI and Davis & Burton. Both parties entered into this contract, which contained the indemnification clause at issue in this case. This Court is not persuaded by the argument set forth by Bituminous.

Accordingly, this Court finds that the indemnification clause contracted between RCDI and Davis & Burton is controlling, holding the "other insurance" clauses of the two insurance policies irrelevant. Thus, Bituminous is responsible for the entire amount of attorney's fees owed to RCDI in connection with its preparation of a defense in this matter.

With regard to RCDI's Motion for Post-Judgment Costs, this Court cannot find that RCDI is entitled to said costs from the October 5, 2007, Order. That Order did not provide a monetary amount of fees owed to RCDI. Instead, the Order provided that RCDI was entitled to reasonable attorney's fees, and if the parties could not agree upon that amount, this Court would make the decision. The parties were unable to reach an agreement on the amount of fees until a stipulated agreement was submitted by counsel for the parties on July 13, 2009.

The stipulation indicated that the parties agreed that the amount of attorney's fees and expenses incurred by RCDI in the defense of Civil Action No. 01-C-251 was $95,334.93. The stipulation further indicated that the parties agreed that the amount of attorney's fees and expenses incurred by RCDI in the defense of Civil Action No. 05C-342 was $27,650.72. Thus, based upon the Order of October 5, 2007, the parties agreed

upon the amount of attorney's fees on July 13, 2009, which should be the date that post-judgment interest begins.

DECISION

It is hereby **ORDERED** and **ADJUDGED** that RCDI's Motion for Attorney's Fees, Costs and Post-Judgment Interest is **GRANTED**. The Court **FINDS** that RCDI and Davis & Burton entered into a contract containing an indemnification clause, thereby requiring Davis & Burton to indemnify RCDI against any and all claims. This indemnification clause overrides the "other insurance" clauses in the insurance policies. Thus, Bituminous is responsible for the entire amount of attorney's fees and costs owed to RCDI.

It is further ordered that RCDI is entitled to post-judgment costs from July 13, 2009, the date the parties submitted a stipulation with regard to RCDI's attorney's fees and costs.

The Clerk of this Court is hereby **ORDERED** to forward a copy of this Order to the parties' counsel of record at their respective addresses of record.

A True Copy:
ATTEST:
Louvonne Arbuckle
Clerk, Circuit Court
Greenbrier County, WV
By _____ Deputy

Entered this 9th day of September, 2009.

James J. Rowe, Judge
Eleventh Judicial Circuit

CIRCUIT COURT GREENBRIER CO., W.VA.
FILED
SEP 09 2009
LOUVONNE ARBUCKLE, CLERK