



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

Civil Action No. 16-C-7000

THIS DOCUMENT APPLIES TO:

**CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY, INC.,
a West Virginia corporation,
Plaintiff,**

v.

Civil Action No. 15-C-1022 KAN

**TRIAD ENGINEERING, INC., et al.,
Defendants.**

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

The Presiding Judges have reviewed and maturely considered *Defendant Cast & Baker Corporation's Renewed Motion for Summary Judgment* (Transaction ID 62612486), *Triad Engineering, Inc.'s Response to "Defendant Cast & Baker Corporation's Renewed Motion for Summary Judgment"* (Transaction ID 62661535), *Westfield Insurance Company's Response to Cast & Baker Corporation's Renewed Motion for Summary Judgment* (Transaction ID 62663573), and *Defendant Cast & Baker Corporation's Joint Reply in Support of its Renewed Motion for Summary Judgment as to Triad Engineering, Inc.'s Cross-Claims* (Transaction ID 62688411) and have considered oral argument of counsel regarding the same at the hearing on November 30, 2018. 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** *Defendant Cast & Baker Corporation's Renewed Motion for Summary Judgment* (Transaction ID 62612486) 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 February 19, 2003, the Central West Virginia Regional Airport Authority (“Airport”) entered into a contract with Triad Engineering, Inc., entitled “Agreement for Professional Services for FAA AIP Project No. 3-54-003-3103,” (hereafter “Triad’s contract”) which governed Triad’s design and inspection services for the project.

3. On March 23, 2005, Cast & Baker entered into a contract with the Airport to serve as general contractor for certain work related to the construction of Runway Safety Area (“RSA”) improvements on Runways 5/23 at the Airport as well as for improvements to Taxiway

A. This work was described in Article I of the C&B Contract as:

1.01 CONTRACTOR shall complete all work as specified in the Contract Documents. The Work is generally described as follows:

Runway 5, Runway 23, and Taxiway A Safety Area Improvements, which includes:

Excavation and embankment for extended runway safety areas for Runway 5-23, and the realignment of Taxiway A, construction of the reinforced earth/rock slopes, concrete paving, airfield lighting and signage, the installation of piping and drainage structures, regrading and revegetation, and airfield utility relocations.

C&B Contract, Art. 1, attached as Exhibit A to *Triad Engineering, Inc.’s Response to “Defendant Cast & Baker Corporation’s Renewed Motion for Summary Judgment* (Transaction ID 62661535) (hereafter “*Triad’s Response*”).

4. Included with the C&B Contract were the “Standard General Conditions of the Construction Contract” (“General Conditions”). Article 6 of the General Conditions set forth C&B’s responsibilities, one of which was to indemnify both the Airport and Triad. Paragraph 6.20.A of the General Conditions sets forth this indemnification requirement and provides:

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.**

General Conditions, §6.20.A (Emphasis added), attached as Exhibit B to *Triad's Response*. (The C&B Contract and the General Conditions collectively referred to herein as the "C&B Contract").

5. C&B's indemnity obligation to Triad survives final payment, completion, and acceptance of the Work. Ex. B at §17.04 ("All...indemnifications...will survive final payment, completion, and acceptance of the Work or termination of completion of the Agreement.") There is, however, an exception to this broad indemnity obligation. Under this exception, C&B's indemnity obligations do not extend to Triad's liability if such liability arises out of certain specifically enumerated activities. The exception is set forth in Paragraph 6.20.C and provides:

C. The indemnification obligations of CONTRACTOR under paragraph 6.20.A 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 or 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.

Id. at §6.20.C.

6. The General Conditions further contain numerous defined terms. One of these is “Work,” which is defined as:

Work -- The entire completed construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

Id. at §1.01.A.48.

7. Other specifically defined terms include “Drawings,” “Specifications,” “Change Order,” “Field Order,” and “Work Change Directive.” *Id.* at §1.01.A. Significantly, the term “professional services” is not defined in the C&B Contract or in the General Conditions.

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

9. After the March 12, 2015 partial failure of the MSE, numerous parties filed suit against both Triad and C&B.

10. Since filing its initial Complaint on May 22, 2015, the Airport has filed three amended complaints.

11. Additionally, as to Triad, the Third Amended Complaint asserted a new Count XIV, which alleged that Triad was negligent in supervising its office staff, in assigning qualified personnel to perform work on the project, and in otherwise “negligently managing its business operations.” Third Am. Compl, Count XIV at ¶¶107-144 (Trans. ID 62170183).

12. While it is alleged generally that Triad improperly designed and engineered the MSE, the Airport also alleged that Triad “provided...non-professional services including, but not

limited to: design; engineering; supervision; inspection; monitoring; construction decision-making; construction process approval; construction management; and advice...” *Id.* at ¶2.¹

13. After the Airport filed its action, the Property Owners filed their complaints, which included allegations that Triad and the Airport failed “to monitor the activities of [C&B]...” *See* T. Carter Compl., ¶70, attached as Exhibit C to *Triad’s Response*. Similarly, Kenneth Carter, in his Complaint, alleged that Triad was engaged not only to design the MSE, but also to “supervise and inspect the Yeager Airport runway and extension thereof.” *See* K. Carter Compl. at ¶7, attached as Exhibit D to *Triad’s Response*.

14. Triad’s contract with the Airport included the provision of inspection services wherein Triad was to provide inspection for “periodic on-site inspection” of the project. Triad was to inspect “within the limits of the Specifications, but not direct the operations” of C&B or its subcontractors doing work on the project. *See* Triad’s Contract, Section II Inspection Services at 2, attached as Exhibit E to *Triad’s Response*. Not unlike Theodore Carter’s allegations that Triad failed to monitor C&B, Kenneth Carter and his co-plaintiffs alleged that Triad was aware, or should have been aware, of C&B’s negligence in the construction of the runway expansion, but allowed it to continue. K. Carter Compl. at ¶20.

15. In its Answers to all of the Complaints filed in these cases, Triad asserted Cross-Claims against Cast & Baker for contribution and for express indemnification under C&B’s Contract with the Airport.

¹ The only specific citation to the Third Amended Complaint C&B makes is to Paragraph 45(a), which is one of 13 enumerated acts that the Airport contends constitute breaches of duties. Other alleged breaches include improper testing, failure to prevent the collapse, improper inspection, improper monitoring, failure to warn, negligent construction, and negligent supervision. *See* Third. Am. Compl., ¶45.

16. The Property Owner Cases, which were before this Court as a reverse bifurcated, damages-only trial, all were settled without a determination of liability.² The Airport's claims against all of the Defendants remain in dispute.

17. In addition to seeking a determination of liability, the Airport seeks recovery of damages which include, but are not necessarily limited to: 1) property damage payments and courtesy payments to Keystone Dr. residents; 2) recoupment of professional services; 3) costs of slope mitigation and stabilization; 4) costs to rebuild and replace utilities; 5) costs to rebuild the Runway 5 RSA and reinstall the EMAS; 6) the loss of the home it owned on Keystone Dr.; and 7) lost revenues associated with the alleged loss of a flight to Dallas, TX. *See* Airport Supp. Resp. to C&B First Set of Interrogatories and Requests for Production, Int. # 11, attached to *Triad's Response* as Exhibit F (Trans. ID 62046836); Dep. Nick Keller, at p. 31, attached to *Triad's Response* as Exhibit G; Dep. Terry Sayre at pp. 64-72, attached to *Triad's Response* as Exhibit H; and calculations reflecting total loss, attached to *Triad's Response* as Exhibit I; *See also* Westfield's Resp. to Travelers' Motion for Summary Judgment at 20 (Trans. ID 62625502).

18. 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 evidenced in their *Motion to Approve Settlement* (Transaction ID 61915545).

19. In furtherance of Triad's partial settlement, the Property Owner Plaintiffs signed the *Settlement Agreement and Release of Triad Engineering, Inc.*, which released "Triad from any and all liability to the Plaintiffs except to the extent that Triad is found to be covered by one

² After Triad reached a partial settlement with James and Donna Johnson, the Court granted the Defendants' Motion for Summary Judgment by finding that the Johnsons incurred no damages that were caused by the Defendants.

or more of the policies of insurance issued by Westfield Insurance Company, The Cincinnati Insurance Company, and/or The Travelers Indemnity Company.” The policies of insurance issued to Triad by Westfield, Cincinnati, and Travelers are commercial general liability insurance policies which all contain professional liability exclusions. *See Westfield Insurance Company’s Response to Plaintiff’s Motion for Summary Judgment* (Transaction ID 62314280); Exhibits C, D, and E to *Memorandum of Law in Support of Defendant, Cincinnati Insurance Company’s Renewed Motion for Summary Judgment* (Transaction ID 62577190); and *The Travelers Indemnity Company’s Motion for Summary Judgment Regarding Insurance Coverage* (Transaction ID 62579412).

20. More recently, Triad, Westfield, Cincinnati, and AEIC have reached a full and final settlement agreement with the Airport as it relates to the Airport’s claims against Triad in this case and in the Taxiway A case, Civil Action No. 17-C-825 KAN. Thus, the only issue in which Triad remains involved in this litigation is its cross-claim for express indemnification against Cast & Baker and Triad’s bifurcated claims against Travelers.³

21. At the time of Triad’s settlements, 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.

CONCLUSIONS OF LAW

1. 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 Triad’s claims against Travelers are not at issue in this Order.

2. "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).

3. "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).

4. "There are two basic types of indemnity: express indemnity, based on a written agreement, and implied indemnity, arising out of the relationship between the parties. One of the fundamental distinctions between express indemnity and implied indemnity is that an express indemnity agreement can provide the person having the benefit of the agreement, the indemnitee, indemnification even though the indemnitee is at fault. Such result is allowed because express indemnity agreements are based on contract principles. Courts have enforced indemnity contract rights so long as they are not unlawful." Syl. Pt. 1, *Valloric v. Dravo Corp.*, 178 W. Va. 14, 15, 357 S.E.2d 207, 208 (1987).

5. The indemnification clause contained in Cast & Baker's Contract at ¶6.20 is clear and unambiguous.

6. The indemnification clause applies to damages arising out of or related to Cast & Baker's construction of the MSE if such damage is not to the work itself and is caused in whole or in part by Cast & Baker's negligence.

7. The indemnification clause applies regardless of Triad's negligence, unless such negligence arises out of the specifically enumerated activities set forth in Paragraph 6.20.C. of Cast & Baker's contract.

8. Indemnification provisions, such as this one, which provide for indemnification for one's own negligence are valid and enforceable in West Virginia. *See* Syl. Pt. 4, *State ex rel. Vapor Corp. v. Narick*, 320 S.E.2d 345 (W.Va. 1984); Syl. Pt. 3, *Elk Run Coal Co., Inc., v. Canopus U.S., Ins., Inc.*, 775 S.E.2d 65, 66 (W.Va. 2015).

9. C&B's contract at §6.20.C.1 & 2 contains an exception to its indemnity obligations if the liability of Triad arises out of certain, specifically enumerated activities:

1. the preparation or approval of, or the failure to prepare or 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.***

(Emphasis added.)

10. Cast & Baker has argued in its Renewed Motion for Summary Judgment (Transaction ID 62612486) that all actions of Triad were professional in nature and covered by the professional services exclusion in Westfield's insurance policy and, therefore, Cast & Baker's indemnity to Triad do not apply.

11. The C&B Contract exempts Cast & Baker from its indemnity obligations for Triad's liability arising out of the specifically enumerated items in Sections 6.20.C.1 and 2 of the General Conditions, which are quoted above at paragraph 9.

12. While the Court ultimately ruled that all of Triad's services provided on this project were "professional services" that were excluded from coverage under the Westfield CGL insurance policy, this ruling is distinct from a finding that the allegations against Triad in these cases fall into one of the categories of activities set forth in the C&B Contract to which Cast & Baker's indemnity obligation does not extend. *Memorandum Opinion and Order Denying Central West Virginia Regional Airport Authority, Inc.'s Motion for Summary Judgment on Plaintiff's Claim for Declaratory Judgment Against Westfield Insurance Company and Granting*

the Cross-Motion for Summary Judgment on Coverage Issues filed by Westfield (Transaction ID 62926234)

13. Nowhere in the C&B Contract is Cast & Baker exempted from its indemnity obligations for Triad's liability if that liability arises out of alleged negligent business management practices, negligent supervision of employees, or the alleged negligent failure to assign properly qualified individuals to the project, which allegations the Airport specifically asserted against Triad in its Third Amended Complaint and later unsuccessfully argued created coverage under Westfield's CGL policy. *See* Airport's Motion for Summary Judgment on Plaintiff's Claims for Declaratory Judgment Against Defendant Westfield Insurance Company, §A.5.i-iii, at 10-20 (Trans. ID 62263384). Likewise, the C&B Contract does not specifically exempt liability for damages arising out of alleged failure to inspect or monitor. Inspection services were provided for in Triad's contract with the Airport and Plaintiffs in these cases have alleged that Triad was negligent in the monitoring and inspection of C&B and its subcontractors.

14. To the extent that Triad's liability may arise out of the giving or failing to give directions or instructions, there is an important qualifier in §6.20.C.2 of the C&B Contract that must be met to excuse C&B from its indemnity obligations. Under this provision, there is no obligation to indemnify Triad if its liability arises from "giving directions or instructions, or failing to give them, **if that is the primary cause of the injury or damage.**" Ex. B, §6.20.C.2 (Emphasis added). Thus, if Triad's liability is based on the giving or failing to give instruction, indemnification is owed unless that action "is the primary cause of the injury or damage." It is a question of fact as to whether Triad's giving directions or instructions or failing to give them is the primary cause of the injury or damage to the Airport. Thus, summary judgment in favor of Cast & Baker is improper.

15. Cast & Baker also argues that it owes no indemnity to Triad for the Airport's claim because the damage is to the Work itself and cites to Paragraph 6.20.A.1.

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

16. However, the Airport is claiming numerous items of damages that total in the millions of dollars that arise out of "injury to or destruction of tangible property" and resulting loss of use that are not property damage to the work itself. In addition to the EMAS blocks, which were purchased directly by the Airport, the Airport claims damages to property other than to the Work itself. These include, but are not limited to: 1) the damage to the Airport-owned home on Keystone Dr.; 2) the property damage payments and courtesy payments to Keystone Dr. residents; 3) costs to rebuild and replace utilities (which were owned by non-party utility companies and the Charleston Sanitary Board); 5) cost to reinstall the EMAS (in addition to the cost of the system lost); and 6) lost revenues associated with the alleged loss of a flight to Dallas, TX.

17. "Work" is defined by §1.01.A.48 of the C&B Contract as:

Work -- The entire completed construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of **performing or providing all labor**, services, and documentation necessary to produce such construction, and **furnishing, installing, and incorporating** all materials and equipment into such construction, all as required by the Contract Documents.

(Emphasis added).

18. "Furnish, Install, Perform, Provide" is defined in Section 1.02.D.1-4 of the General Conditions as:

1. The word "furnish," when used in connection with services, materials, or equipment, **shall mean to supply and deliver said services, materials, or equipment to the Site** (or some other specified location) ready for use or installation in usable or operable condition.

2. The word "install," when used in connection with services, materials, or equipment, shall mean to put into use or place in final position said services, materials, or equipment complete and ready for intended use.

3. The words "perform" or "provide," when used in connection with services, materials, or equipment, **shall mean to furnish and install said services, materials, or equipment** complete and ready for intended use.

4. When "furnish," "install," "perform," or "provide" is not used in connection with services, materials, or equipment in a context clearly requiring an obligation of CONTRACTOR, "provide" is implied. is implied.

(Emphasis added).

19. Triad posited that the evidence has proved that Cast & Baker did not “furnish” the EMAS blocks or “perform or provide” work related to those blocks. It did not furnish the EMAS blocks because it did not “supply and deliver” them to the site. They were bought by the Airport and supplied by Zodiac. Similarly, Cast & Baker did not “perform” or “provide” work related to them. “Perform” or “provide” requires that C&B both “furnish *and* install” materials. (“...**shall mean** to furnish **and** install said...materials....”). To constitute “Work” under the C&B Contract, C&B must have “performed or provided” labor or services. *Id.* at §1.01.A.48. It did not undertake tasks that amount to “Work” under the C&B Contract with regard to the EMAS because “perform” or “provide” includes to “furnish” materials, which it did not do with respect to the EMAS. Similarly, it did not “furnish, install, *and*, incorporate” the EMAS blocks because to “furnish” them it must have “suppl[ied] and deliver[ed]” them to the site, which it did not do. Again, this will be a question for the jury to determine and is not a proper basis upon which to award summary judgment in favor of Cast & Baker.

20. Cast & Baker's final argument in support of its Renewed Motion for Summary Judgment is that Triad should be judicially estopped from asserting its cross-claim. The Court disagrees.

21. "Judicial estoppel is an extraordinary remedy that should be invoked only when a party's assertion of a contrary position will result in a miscarriage of justice and only in those circumstances where invocation of the doctrine will serve its stated purpose." *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 618 S.E.2d 506, 513 (2005)(internal citations omitted). It seeks to "protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." *Id.* at 513, n. 17(citing *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870, 887 (2004).

22. Judicial estoppel applies to bar a party from re-litigating an issue when: "(1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." *Id.* at 515. The elements of judicial estoppel do not apply here to estop Triad from pursuing its cross-claim for express indemnification against Cast & Baker.

23. Based on the contractual relationship between parties, the Court finds there must be a factual determination on the issue of proximate cause. Because there are significant questions of fact, the Court concludes Defendant Cast & Baker Corporation's renewed motion for summary judgment should be denied.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that *Defendant Cast & Baker Corporation's Renewed Motion for Summary Judgment* is hereby **DENIED**. Cast & Baker's objections to this Order are noted and preserved.

It is so ORDERED.

ENTER: February 7, 2019

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