



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.,

Plaintiff,

v.

Civil Action No. 15-C-1022 KAN

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

Defendants.

**ORDER DENYING NOVEL GEO-ENVIRONMENTAL, LLC'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO THE LIMITATION OF LIABILITY
PROVISIONS IN ITS CONTRACT WITH CAST & BAKER CORPORATION**

On November 30, 2018, a hearing was conducted on *Defendant Novel Geo-Environmental LLC's Motion for Partial Summary Judgment as to the Limitation of Liability Provision in its Contract with Cast & Baker Corporation* (Transaction ID 62611597) and Defendant Cast & Baker Corporation's Response in Opposition (Transaction ID 62662459). Having reviewed the motion and briefs in support of and in opposition to said motion, having heard oral argument of counsel, and 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 Novel Geo-Environmental LLC's Motion for Partial Summary Judgment as to the Limitation of Liability Provisions in its contract with Cast & Baker Corporation* based on the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

FINDINGS OF FACT

1. This case arises from a partial slope collapse of a mechanically stabilized earthen structure at the end of Runway 5 at Yeager Airport in Charleston, West Virginia on March 12, 2015. *See generally Third Amended Complaint* (Transaction ID 62170183). In 2005 Plaintiff Airport, a political subdivision entered into a contract with Cast & Baker Corporation for Cast & Baker to serve as the general contractor for this Airport Improvement Project.

2. In or around June 9, 2005, Cast & Baker contracted with Novel Geo-Environmental LLC (“Novel”) to have it perform certain compaction and concrete testing services with respect to the Runway 5 mechanically stabilized earthen structure for the Airport Improvement Project at Yeager in Charleston, West Virginia. Pursuant to this subcontract and correspondence from Novel, “NGE will provide experienced engineering technicians to perform fill compaction and concrete testing as required by the project specifications or directed by the Project Engineer.”

3. Cast & Baker Corporation contends it relied upon Novel’s geotechnical work product in performing the construction of the mechanically stabilized earthen structure. Cast & Baker further contends Novel had a duty to render its professional services with the ordinary skill, care, and diligence commensurate with that rendered by its profession in regard to the subject runway extension project including any engineering services to Cast & Baker and Plaintiff Airport. Cast & Baker also alleges it relied upon the professional services of Novel for compliance with the required factors of safety for this Airport Improvement Project. This Court makes no finding with respect to the merit of these allegations, but presents these allegations to provide context for the issues decided in this Order.

4. The June 9, 2005, contract between Novel and Cast & Baker contained general conditions which include the following limitation of liability provision in Paragraph 6:

LIMITATION OF LIABILITY- Client agrees that NGE's liability for any damage on account of any error, omission or other professional negligence will be limited to a sum not to exceed \$50,000 or NGE's fee, whichever is greater. If higher limits of professional liability are desired, Client should discuss the acquisition of additional liability coverage and corresponding charges involved with NGE prior to signing this document. In the event that Client makes a claim against NGE for any alleged error, omission or other act arising from NGE's professional service, and the Client fails to prove such a claim, then Client shall pay all attorney's fees and other costs incurred by NGE in defending itself against the claim.

4. On or about August 2, 2016, with its Answer to Plaintiff's Second Amended Complaint (Transaction ID 60199975), Cast & Baker asserted a cross-claim for indemnification against Novel based upon an indemnification provision in the Novel/Cast contract.

5. On or about August 5, 2016, Novel filed an Answer to Cast & Baker's cross-claim - denying all liability, and asserting, among others, the following Fifth Affirmative Defense:

NGE asserts its rights pursuant to paragraph 6 of its contract with Cast & Baker, titled "Limitation of Liability." Pursuant to this provision, NGE's liability to Cast & Baker, if any, and which NGE expressly denies, is limited to \$50,000 or NGE's fee, whichever is greater. Further, insofar as Cast & Baker has made a claim against NGE arising from NGE's professional services, in the event Cast & Baker fails to prove such a claim, Cast & Baker is obligated to pay all of NGE's attorneys' fees and other costs incurred defending Cast & Baker's cross-claim.

See Transaction ID 60190351.

6. Paragraph no. 23 of the General Conditions of the Novel/Cast & Baker contract states:

GOVERNING LAW – This Agreement shall be governed in all respects by the laws of the State or Commonwealth in which it is issued.

7. Novel sought to enforce this limitation of liability provision with respect to Cast & Baker's cross-claim for contractual indemnification included with Cast & Baker's answer to Plaintiff's Second Amended Complaint. *Defendant Cast & Baker Corporation's Answer to Plaintiff's Second Amended Complaint and Cross-Claims* (Transaction ID 60199975)

CONCLUSIONS OF LAW

1. “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.” The Court stated in *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. Our Supreme Court has recognized that

[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.

Syl. pt. 1, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 614 S.E.2d 680 (2005), quoting Syl. pt. 1 of *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962).

3. As the *Wellington* Court recognized,

this State’s public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public.

[Further, courts]. . .are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

Wellington, 217 W.Va. at 38, citing *State v. Memorial Gardens Development Corp.*, 143 W.Va. 182, 191, 101 S.E.2d 425, 430 (1957).

4. Moreover,

[w]hen a written contract expresse[s] the intent of the parties in clear and unambiguous language, the courts will not resort to construction but will give force and effect to the instrument according to its provisions, in the absence of fraud or other grounds which affect its enforcement.

Kanawha Banking & Trust Co. v. Gilbert, 46 S.E.2d 225, 236 (W.Va. 1941)(holding that “[i]t is not the province of the court to alter, pervert or destroy the clear meaning and intent of the parties as plainly expressed in the written contract, or to make a new contract for them.”).

5. The Limitation of Liability Clause contained in the Novel contract with Cast & Baker is repugnant to West Virginia and Pennsylvania’s public policy. Therefore, the limitation of liability clause is unenforceable. Public policy is paramount in this case because of concerns with public safety and welfare.

6. In Syllabus Point 3 of *Finch v. Inspectech, LLC*, 229 W.Va. 147, 727 S.E.2d 823 (2012), the Supreme Court of Appeals of West Virginia held that, “When an express agreement is freely and fairly made, between parties who are in an equal bargaining position, **and there is no public interest with which the agreement interferes**, it generally will be upheld.”

(Emphasis added.)

6. Pennsylvania maintains a similar precedent to that of West Virginia. The Pennsylvania Supreme Court held, “A clear and unambiguous contract provision must be given its plain meaning, unless to do so would be contrary to a clearly expressed public policy.” *Antanovich v. Allstate Ins. Co.*, 507 Pa. 68, 76, 488 A.2d 571, 575 (1985). Furthermore, “it is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in [declaring that policy to be against public policy].” *Guardian Life Ins. Co. v. Zerance*, 505 Pa. 345, 354, 479 A.2d 949, 954 (1984) *Windrim v. Nationwide Ins. Co.*, 537 Pa. 129, 135-136 (1994).

7. Limiting Novel’s potential liability as it proposes flagrantly disregards West Virginia and Pennsylvania law which holds public policy paramount. This Court previously held

that public health and safety take precedent in this case. Here, where Novel performed professional services on the runway safety area, concerns for safety and responsibility should prevail under the public policy doctrine which is recognized in both West Virginia and Pennsylvania.

8. The Presiding Judges FIND there is no public policy greater than the protection of people and property. The Limitation of Liability Clause contained in Novel Geo-Environmental LLC's subject contract is not applicable because the inferior public policy of freedom to contract cannot supplant the greater public policy of safety. Public safety remains paramount and to limit liability violates this State's strong public policy that favors public safety.

9. There is reserved to any party aggrieved hereby an objection to and exception with the rulings of this Court.

WHEREFORE, it is **ORDERED, ADJUDGED, and DECREED** that *Defendant Novel Geo-Environmental LLC's Motion for Partial Summary Judgment as to the Limitation of Liability Provision in its Contract with Cast & Baker Corporation* (Transaction ID 62611597) is **DENIED**.

It is so **ORDERED**.

ENTER: February 5, 2019.

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