



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

Civil Action No. 16-C-7000

THIS DOCUMENT APPLIES TO:

**JAMES JOHNSON and
DONNA JOHNSON,
Plaintiffs,**

v.

Civil Action No. 16-C-1826 KAN

**CAST & BAKER CORPORATION,
TRIAD ENGINEERING, INC. and
CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY,
Defendants.**

**ORDER GRANTING “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* and *Memorandum of Law in Support of Defendants’ Motion for Summary Judgment*, (Transaction ID 61953458), *Triad Engineering, Inc’s Response to “Cast & Baker Corporation’s Motion for Summary Judgment,”* (Transaction ID 62006802), and *Defendant Cast & Baker Corporation’s Reply in Support of its Motion for Summary Judgment* (Transaction ID 62034837) and heard arguments of counsel regarding the same. The Presiding Judges find the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided. Having conferred with one another to insure uniformity of their decisions, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously **GRANT** 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. James Johnson owns four lots of land on Keystone Drive. The addresses of these properties are:

a) 270 Keystone Drive (Tax Map 44 Parcels 78.1 and 79.1)

b) 239/240 Keystone Drive (Tax Map 44M Parcel 20) and

c) 212½ Keystone Drive (Tax Map 44M Parcel 11)

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

4. On December 8, 2016, James Johnson and Donna Johnson filed a lawsuit in the Circuit Court of Kanawha County.

5. In its answer, Triad Engineering, asserted a cross-claim against Cast & Baker Corporation. (Transaction ID 60151197). This cross-claim states, “In the March 2005 agreement between Cast & Baker and the Airport Authority for the Runway 5, Runway 23, and Taxiway Safety Area Improvements, Cast & Baker agreed to indemnify and hold harmless both Triad and the Airport from any personal injury or property claims arising from Cast & Baker’s alleged negligence with regard to its role in the construction of Runway 5.”

4. James Johnson and Donna Johnson are not residents of Keystone Drive. They live in Marmet, West Virginia and have lived there since 2010, five years prior to the partial slope collapse. (Depo. J. Johnson at 17:20-18:20).

5. None of the four parcels of land suffered any flooding or physical damage as a result of the March 12, 2015 slide. (Depo. D. Johnson 52:4-5).

6. Any personal property of James and Donna Johnson was either stolen or destroyed with the structure when the Kanawha County Commission removed the buildings. (Depo. J. Johnson 119).

7. On March 16, 2018, this Court granted Cast & Baker Corporation, Triad Engineering, Inc., and Central West Virginia Airport Authority's Motion for Summary Judgment in the Johnson case. The Order held that there was no genuine issue of material fact regarding the cause of Plaintiffs' alleged property damage.

8. The Order further held that Defendants' actions were not the proximate cause of Plaintiff's alleged property damages.

9. Triad Engineering, Inc. bases its cross-claim upon language set forth within a Standard Conditions of the Construction Contract.

10. This Standard Conditions of the Construction 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, costs, 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 upon such

indemnified party by Laws and Regulations regardless of the negligence of 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.

(Emphasis added.) Further, "Work" is defined as:

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 incorporation of all materials and equipment into such construction, all required by the Contract Documents.

CONCLUSIONS OF LAW

1. This issue is properly before the court to be determined as a matter of law. "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. The issues presented in Triad Engineering's Cross-Claim are ripe for adjudication as the underlying predicate issues have been resolved in their entirety through summary judgment in favor of the Defendants.

3. There is no genuine issue of material fact with regard to indemnification as to whether defense and indemnification are owed to Triad Engineering Inc. as the requirements which activate indemnification in this case have not been met in this case.

4. 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).

5. Here, the contract language is plain and unambiguous.

6. The underlying claims by Plaintiffs did not arise out of the work performed by the Defendants in this case. Rather, the destruction and removal of structures and personal property on the properties in questions was done either by the Plaintiffs themselves or by order of the Kanawha County Commission.

7. Section 6.20A expressly states that claim must arise out of relate to the performance of the work. Based upon this Court’s previous ruling, the Plaintiffs’ claims did not arise from the work.

8. Further, the contract language requires that the damages be caused in whole or in part by a negligent act or omission of the contractor. Summary judgment was found in favor of Cast & Baker. The Court’s Order expressly states that Plaintiffs’ damages were not proximately caused by Defendants. Therefore, any damages asserted by the Johnsons did not arise out of any acts or omissions of Cast & Baker. Furthermore, the Order states that the damages of Plaintiffs

were not caused in whole or in part by any negligent act of the contractor. As such, Triad Engineering fails to satisfy the requirements for indemnification in this case.

9. The Presiding Judges FIND that the evidence established in this case demonstrates there is no genuine issue of material fact and that Cast & Baker Corporation is entitled to summary judgment as a matter of law as to Triad Engineering, Inc.'s Cross-Claim.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that the Cross-Claim asserted against Defendant Cast & Baker Corporation in the matter of *James Johnson and Donna Johnson v. Cast & Baker Corporation, Triad Engineering, Inc. and Central West Virginia Regional Airport Authority*, Civil Action No. 16-C-1826 KAN is hereby **DISMISSED WITH PREJUDICE**. The objections of Triad Engineering, Inc., are hereby noted and preserved.

The Court directs the Mass Litigation Manager to send a copy of this Order to Plaintiffs James Johnson and Donna Johnson via U.S. Mail, First Class, and Certified Mail, Return Receipt Requested, to the following address: 313 99th Street, Marmet, West Virginia 25315. A copy of this Order has been electronically served on all counsel of record via File and ServeXpress this day.

It is so **ORDERED**.

ENTER: January 9, 2019.

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