



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

CIVIL ACTION NO. 16-C-7000

THIS DOCUMENT APPLIES TO:

THEODORE CARTER and
REBECCA CARTER, husband
and wife,

Plaintiffs,

v.

Civil Action No. 15-C-1074 KAN

CENTRAL REGIONAL WEST
VIRGINIA AIRPORT AUTHORITY,
COROTOMAN, INC., a West Virginia Corporation,
JOHN WELLFORD, individually and as Agent for
COROTOMAN, INC. and
Corporation; and CAST & BAKER CENTRAL REGIONAL WEST
VIRGINIA AIRPORT AUTHORITY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
an Ohio corporation,

Defendants.

ORDER

The Presiding Judges have reviewed and maturely considered:

1. PLAINTIFFS' BRIEF IN SUPPORT OF THEIR POSITIONS REGARDING THE TWO EXCLUSIONS RELIED ON BY NATIONWIDE MUTUAL FIRE INSURANCE COMPANY IN ITS DECLARATORY JUDGMENT COVERAGE CLAIM (Transaction ID 60275380) e-filed 3/1/2017;
2. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MOTION TO DISMISS OR STAY PLAINTIFFS' CLAIMS AGAINST NATIONWIDE IN AMENDED COMPLAINT (Transaction ID 60276020) e-filed 3/1/2017; and
3. COVERAGE BRIEF AND MOTION FOR SUMMARY JUDGMENT OF NATIONWIDE MUTUAL FIRE INSURANCE COMPANY (Transaction ID 60344583) e-filed 3/15/2017.

Upon review and consideration of all applicable responsive pleadings and exhibits, the Presiding Judges find the facts and legal arguments made by the parties are adequately presented, and the decisional process would not be significantly aided by oral argument. 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 rule on the above-listed motions.

Factual Background

1. Theodore and Rebecca Carter (“The Carters”) owned residential property located at 151 Keystone Drive, Charleston, Kanawha County, West Virginia. Am. Compl. D. J. ¶ 1

2. On March 11, 2015, the Carters and other residents of Keystone Drive were evacuated from their homes at the request of Yeager Airport representatives because of concern that a man-made Engineered Material Arresting System (“EMAS”) located on the property of the Yeager Airport in Charleston, West Virginia, might collapse and cause harm to them and/or their property. Am. Compl. D.J. ¶ 3

3. On or about March 12, 2015, the EMAS collapsed, resulting in fill material from the EMAS covering a portion of Keystone Drive and a stream located in front of the Carters’ home. The Carters assert the fill material from the EMAS did not reach the Carter home and caused no damage to structures on the Carter property. Am. Compl. D.J. ¶¶ 6-7

4. Following the collapse of the EMAS, representatives of Yeager Airport (“the Airport”) approached the Carters on March 12, 2015, and requested an easement to permit Airport representatives to dig a trench through that portion of the Carters’ property where the stream had previously flowed. The Carters agreed to provide the Airport with an easement in exchange for payment of \$5,000. The trench was excavated immediately by Airport representatives, permitting the free flow of water through the trench and the reduction of water levels upstream. Am. Compl. D.J. ¶¶ 8-9

5. On or about March 13, 2015, Airport representatives demolished the Carters’ home and its contents with heavy equipment. Am. Compl. D.J. ¶ 10

6. The Carters allege that, since the filing of their original complaint, they have conducted discovery and have obtained evidence that Airport representatives demolished their home and its contents on March 13, 2015, because of the Airport's mistaken belief that the Airport actually owned the Carters' property. Am. Compl. D.J. ¶¶ 11-13, 30

7. The Carters further allege that John Wellford, as agent and/or apparent agent for Corotoman, Inc. and the Airport, testified that he was on the Carters' property and ordered the demolition of the Carters' home on March 13, 2015, at the direction of the Airport and/or on authority of the Airport. Am. Compl. D.J. ¶ 20

8. The Carters' home was insured by Nationwide homeowner's Policy No. 9247HO 610211 ("the Policy") at the time the Carters' home was demolished. Am. Compl. D.J. ¶33 The Carters filed a claim for the loss of their home under the Policy.

9. On April 28, 2015, Nationwide filed a complaint for declaratory relief in federal district court seeking a declaration that Nationwide was not required to provide insurance coverage for losses resulting from the destruction of the Carters' home pursuant to the "earth movement" and "government acts" exclusions contained in the Policy. *Nationwide Mutual Fire Insurance Company v. Theodore Carter, et al.*, Civil Action No. 2:15-cv-05359 (S.D. W.Va.) The federal declaratory action is pending before Judge Thomas E. Johnston.

10. The Carters answered Nationwide's federal declaratory judgment action, and asserted counterclaims for: (1) breach of contract; (2) common-law bad faith and breach of fiduciary duty; (3) unfair trade practices; and (4) punitive damages.

11. On June 1, 2015, the Carters filed this civil action against Central West Virginia Regional Airport Authority ("Airport"), Triad Engineering, Inc. ("Triad"), Cast & Baker Corporation ("Cast & Baker"), and Nationwide Mutual Fire Insurance Company ("Nationwide").

12. The Carters' state court action alleged negligence against the Airport, Triad, and Cast & Baker, and requested a declaration of coverage under the insurance policy issued by Nationwide. The Carters' declaratory judgment claims against Nationwide mirrored their counterclaims against Nationwide in the federal declaratory judgment action. The Carters' complaint seeks a declaration that Nationwide is legally obligated to pay the claim of the Carters and the contractual damages due to the Carters under the Policy. Complt. at p. 22.

13. The Carters' state court action was removed to federal court on September 14, 2015. *Carter v. Central Regional W.Va. Airport Auth., et al.*, Civil Action No. 2:15-cv-13155 (S.D. W.Va.) The removed action was pending before Judge John T. Copenhaver, Jr

14. On October 14, 2015, the Carters filed a motion to remand their case to the Circuit Court of Kanawha County, West Virginia. ECF No. 17. The Airport also filed a motion to remand on that same date. ECF No. 19.

15. On February 26, 2016, Judge Johnston ordered a stay of all discovery, proceedings and schedule dates in the federal declaratory judgment action pending a ruling on the remand motion in *Carter v. Central Regional W.Va. Airport Auth., et al.*, Civil Action No. 2:15-cv-13155 (S.D. W.Va.). ECF No. 54. Judge Johnston also directed the Clerk of the Court to remove the action from the Court's active docket. *Id.*

16. As Judge Johnston explained, "[ultimately, this Court's consideration of how best to proceed in the present action will depend significantly on whether the related action involving identical claims between these same parties proceeds in federal or state court. Until that determination is made, any further activity in the present case would only serve to complicate the already tortuous state of affairs between these parties." *Id.* p. 5.

17. On July 25, 2016, Judge Copenhaver granted the Carters' and the Airport's motions to remand the Carters' state court action to the Circuit Court of Kanawha County, West Virginia, for lack of subject-matter jurisdiction. ECF 82.

18. The Carters settled with Triad and Cast & Baker, and those Defendants were dismissed from the case on December 14, 2016. *Agreed Order Dismissing Triad Engineering, Inc. and Cast & Baker Corporation with Prejudice* (Transaction ID 60199227)

19. On December 16, 2016, the Carters' civil action along with several other civil actions arising from the collapse of the EMAS at the end of Runway 5 of the Yeager Airport were referred to the Mass Litigation Panel ("the Panel") for further proceedings by Administrative Order of the Supreme Court of Appeals of West Virginia.

20. Thereafter, the Carters requested permission to amend their complaint to pursue new theories of liability against the Airport, and to assert claims against two new Defendants, Corotoman, Inc. and John Wellford. The Carters now claim the Airport negligently demolished their home on March 13, 2015, based on the mistaken belief that the Airport had purchased the Carters' home at the time that the Airport had obtained an easement to dig a trench on the Carters' property. Am. Compl. ¶¶ 7, 73-76, Am. Compl. D.J. ¶¶12-14.

21. The Carters further allege the Airport tried to "cover up" their negligence by falsely stating that an "emergency" existed, and that Triad and Cast & Baker agreed with the Airport's decision to demolish Plaintiffs' home. Am. Compl. ¶¶77-81, Am. Compl. D.J. ¶¶15-19.

22. The Carters also claim John Wellford, individually and as an agent of Corotoman, Inc., precipitously ordered the demolition of their home for his own purposes. Am. Compl. ¶¶16, 82, Am. Compl. D.J. ¶20

Appropriate Jurisdiction for Declaratory Judgment Action to Proceed

Nationwide argues that the state court declaratory judgment proceedings should be dismissed or stayed because maintenance of the state court action wastes judicial resources, and the earlier-filed federal declaratory judgment action will resolve the Carters' claims against Nationwide. However, the federal court remanded the Carters' state court action, including the Carters' declaratory judgment action against Nationwide, back to state court on July 25, 2016. Since that time, Judge Johnston has not lifted the February 26, 2016, stay of proceedings in the federal declaratory action, nor has he restored the federal declaratory judgment action to that court's active docket.

The Carters' civil action, which includes a tort action against the Airport and other Defendants, as well as the declaratory judgment action against Nationwide, has been referred to the Panel for further proceedings. In the interest of judicial economy, the Presiding Judges find it is appropriate for the Carters' declaratory judgment action against Nationwide to proceed in state court before the Panel, along with the Carters' tort action. Accordingly, Nationwide's request to dismiss or stay the Carter's declaratory judgment action in this case pending resolution of the federal declaratory judgment action in *Nationwide Mutual Fire Insurance Company v. Theodore Carter, et al.*, Civil Action No. 2:15-cv-05359 (S.D. W.Va.) is **DENIED**.

The Earth Movement Exclusion

Nationwide's Policy with the Carters states that, "We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded if it is the pre-eminent or efficient proximate cause even if another peril or event contributed concurrently or in any sequence to cause the loss. Policy, Section I, Page D1, 1 Among other things, the Policy excludes a loss proximately caused by "earth movement and volcanic eruption." Policy, Section

I, Page D1, 1.a) “Earth movement means: earth movement due to natural or unnatural causes, including mine subsidence; earthquake; landslide; mudslide; earth shifting, rising or sinking.” Policy, Section I, Page D1, 1.a)

Nationwide argues the “earth movement” exclusion to the Policy should apply because the Carters allege that a “man-made Engineered Material Arresting System (EMAS) located on the property of the Yeager Airport” “collapsed, resulting in fill material from the EMAS covering a portion of Keystone Drive and a stream located in front of the home of the Carters.” Am. Compl. D.J., ¶¶3,6. However, Nationwide conveniently ignores the very next allegation in the Carters’ Amended Complaint: “[t]he fill material from the EMAS did not reach the Carter home and caused no harm to the structures on the Carter property”. Am. Compl. D.J., ¶ 7.

In a feeble attempt to apply the earth movement exclusion to the Carters’ loss, Nationwide simply ignores the fact that it was not the EMAS collapse at the end of Runway 5 that destroyed the Carters’ home. The Carters’ home was demolished by heavy equipment. As asserted by the Carters, “[t]he efficient proximate cause of the demolition of Plaintiffs’ home was its demolition by heavy equipment based on the Airport’s mistaken belief that the Airport owned the Plaintiffs’ property, and not because of any alleged “emergency.” Am. Compl. D.J., ¶ 22.

Furthermore, Nationwide’s attempt to link the destruction of the Carters’ home to the collapse of the EMAS, which resulted in a landslide and subsequent flooding, is disingenuous at best. Neither the collapse of the EMAS, the resulting landslide, nor the flooding of the creek in front of the Carters’ property impacted the Carters’ home. What destroyed the Carters’ home was that someone demolished it with heavy equipment. Am. Compl. D.J., ¶22

Because the EMAS collapse which precipitated the events that give rise to this lawsuit was not the “the pre-eminent or efficient proximate cause” of the demolition of the Carters’ home, the Presiding Judges find the earth movement exclusion of the Policy does not apply and, therefore, Nationwide’s motion to dismiss is **DENIED** on that ground.

The Government Acts Exclusion

Next, Nationwide argues the “government acts” exclusion of the Policy excludes coverage of the Carters’ loss of their home. The Policy excludes a loss proximately caused by “government acts, meaning any loss caused by seizure, destruction, or confiscation by order of any government or public entity.” Policy, Section I, Page D-2, 1.1) However, the Carters’ loss was caused by demolition of the Carters’ home by heavy equipment, based upon the Airport’s mistaken belief that it owned the Carter property, not an “order of any government or public entity” to demolish the Carters’ home.

The Carters have presented substantial evidence that it was not a court order or an order of a government or public entity that lead to the demolition of their home. Rather, there was a mistaken belief by the Airport that it had purchased the Carter property before the Carter home was demolished.¹ No evidence has been presented of a “state of emergency” declared by a court, an administrative agency or the Governor of the State of West Virginia. On the contrary, the Carters assert their home was either demolished because Airport Director Rick Atkinson was misinformed by the Airport’s attorney that the Airport owned the Carter property, or because Mr. Atkinson misunderstood the communication from the Airport’s attorney that only an easement had been obtained from the Carters. In any event, that does not fall within the “governmental acts” exclusion asserted by Nationwide.

¹ The Presiding Judges note that the sum of \$5,000.00 was obviously insufficient to purchase the Carters’ home and property at 151 Keystone Drive.

Furthermore, the FAA emergency plan cited by Nationwide does not give rise to an “order of a governmental or public entity” to destroy the Carters’ home. Rather, the FAA Emergency Plan addresses emergencies that impact the Airport directly. There is no evidence that the Carters’ home in any way put the Airport at risk.

Because the “government acts exclusion” does not apply to exclude coverage of the Carters’ loss, Nationwide’s motion to dismiss is **DENIED** on that ground as well.

Bad Faith

The Presiding Judges have determined that the Carters have raised serious first party bad faith claims against Nationwide, based on the facts developed in discovery. That being said, the Presiding Judges have further determined that the best course of action at this juncture is to hold their ruling on the Carters’ bad faith claims in abeyance, in order to allow the parties to engage in meaningful negotiations during mediation of this case on April 27-28, 2017. Should the parties fail to resolve their dispute the Presiding Judges will revisit this issue.

Accordingly, Nationwide Mutual Fire Insurance Company’s motion to dismiss is **DENIED**. Furthermore, Nationwide’s *Motion for Summary Judgment* (Transaction ID 60344583) is also **DENIED**, as there are heavily contested material issues of fact regarding the application of the “government acts” exclusion to the facts of this case, including whether the Airport and/or its representatives demolished the Carters’ home based upon the mistaken belief that the Airport owned the Carters’ property at the time the Carters’ home was demolished.

This order is entered to advise the parties of the Court's ruling on the above-referenced motions. It is not intended to be a final judgment order for purposes of appellate review. A final judgment order with detailed findings of fact and conclusions of law will be forthcoming.

Plaintiffs Theodore and Rebecca Carter are hereby **ORDERED** to file and serve a proposed final order with detailed findings of fact and conclusions of law as to the above-referenced motions in Rich Text Format **no later than May 12, 2017**. Nationwide Mutual Fire Insurance Company shall file and serve any objection to Defendants' proposed final order in Rich Text Format **no later than May 26, 2017**.

It is so **ORDERED**.

ENTER: April 14, 2017.

/s/ John A. Hutchison
Lead Presiding Judge
Yeager Airport Litigation