

SCANNED

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ZURICH AMERICAN INSURANCE
COMPANY, as subrogee of TURNER
CONSTRUCTION COMPANY,
TURNER CORPORATION, and
TOMPKINS BUILDERS, INC., foreign
corporations,

Plaintiff,

vs.

THRASHER ENGINEERING, INC. d/b/a
THRASHER ENGINEERING, a
West Virginia Corporation,

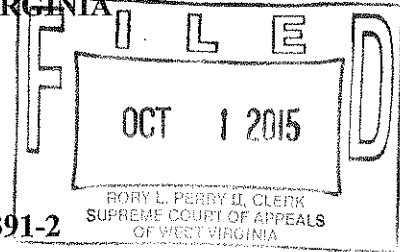
and

MASCARO CONSTRUCTION
COMPANY. LP,
a foreign entity,

Defendants.

Civil Action No.: 14-C-391-2

Judge Bedell



FIRST AMENDED COMPLAINT

1. Plaintiff Zurich American Insurance Company is a New York Corporation engaged in the insurance business with a statutory home office located at One Liberty Plaza, 165 Broadway, 53rd Floor, New York, New York 10006, and a main administrative office or principal place of business located at 1400 American Lane, Schaumburg, Illinois 60196. It is authorized to transact business and has transacted business in the state of West Virginia.

2. Defendant Thrasher Engineering Inc. d/b/a Thrasher Engineering is West Virginia Corporation with its principal place of business located at 600 White Oaks Boulevard, Bridgeport, West Virginia 26330.

3. Defendant Mascaro Construction Company, LP is a Limited Partnership formed pursuant to the laws of the Commonwealth of Pennsylvania with its principal place of business located at 1720 Metropolitan Street, Pittsburgh, Pennsylvania 15233.

4. Turner Construction Company is a New York corporation with its principal place of business located at 375 Hudson Street, New York, NY 10014.

5. Turner Corporation is a Delaware corporation with its principal place of business located at 375 Hudson Street, New York, NY, 10014.

6. Tompkins Builders Inc. is a Washington DC Corporation with its principal place of business located at 2220 25th Place N.E. Washington, DC 20018.

7. Turner Construction Company, Turner Corporation and Tompkins Builders Inc. are all insured by Zurich American Insurance Company under a master builder's risk policy relative to the construction of phase two of the Biometric Technology Center and Central Utilities Plant Expansion at the FBI CJIS Division Complex (the project) in Clarksburg, West Virginia.

8. Turner Construction Company was the general contractor for phase two of the project.

9. Turner Construction Company entered into a contract with Thrasher Engineering, Inc. through which Thrasher Engineering was to provide all services required for the soils inspections including but not limited to building area subgrades, structural fill, utility trenches, and shallow foundation subgrades, to ensure and verify that fill material used on the site was in accord with the project plans and specifications. Further, Thrasher was to perform various tests to ensure the soils/fill were being compacted properly and to the specifications set by the project architect and/or engineer.

10. Mascaro Construction Company, LP was, upon information and belief, the general contractor for phase one of the project, which included the construction of a parking garage and the placement of fill in and around the garage, upon which portions of phase two were constructed, including four or more retaining walls known as the plaza area walls.

11. It is further believed, and therefore averred that Thrasher Engineering Inc. was retained by Mascaro Construction Company, LP to provide soil and other inspection services for phase one of the project. Further, Thrasher was to perform various tests to ensure the soils/fill were being compacted properly and to the specifications set by the project architect and/or engineer.

12. Fill used on the site was not in accord with the plans and specifications as set by the project architect and/or engineer and should not have been used. Furthermore, the fill used on the site was not compacted properly and to the specifications set by the project architect and/or engineer.

13. The use of inappropriate fill and/or the failure to properly compact the fill has resulted in movement, shifting, cracking, settlement, and damage to certain structures constructed on site as part of phase two, including the Plaza Walls, Wall 7, and slab on grade inside of building number 9.

14. Turner Construction has made claim to Zurich for damage to the aforementioned structures pursuant to Zurich's builder's risk coverage for the project.

15. Zurich has and is in the process of adjusting the claim, and has to date made payments as result of the damages to the above referenced structures in excess of \$1.2 million dollars, and may make additional payments in the future under the policy as a result of

the damages at issue for repair costs, expediting expense, contractor's extra expense, and other coverages.

16. Pursuant to the foregoing, Zurich American Insurance Company is legally, equitably and contractually subrogated to the rights of Turner Construction Company, Turner Construction and Thompkins Builders, Inc. relative to the damages at issue.

COUNT I – NEGLIGENCE (THRASHER)

17. Plaintiff asserts, as if fully restated here, its allegation contained in Paragraphs 1-16 of the Complaint.

18. Defendant Thrasher approved fill for use it knew or should have known was not in accord with the plans and specifications as set by the project architect and/or engineer.

19. Defendant Thrasher knew or should have known that the fill was not suitable for the work being performed.

20. Defendant Thrasher knew or should have known that the use of the fill at issue would cause earth movement, shifting, cracking, settlement, drainage problems, and damage to other structures and property on site.

21. Defendant Thrasher knew or should have known that the fill was not compacted properly and to the specifications set by the project architect and/or engineer.

22. Defendant Thrasher knew or should have known that the failure to properly compact the fill would cause earth movement, shifting, cracking, settlement, drainage problems, and damage to other structures and property on site.

23. In spite of the above, Thrasher approved the fill for use at the site.

24. The fill was subsequently used at the site.

25. As a result of the actions/omissions of Thrasher, Plaintiff has suffered damages in excess of the jurisdictional minimum of this Court.

COUNT II – NEGLIGENCE HIRE, RETENTION AND SUPERVISION (THRASHER)

26. Plaintiff asserts, as if fully restated here, its allegation contained in Paragraphs 1-25 of the Complaint.

27. Thrasher hired new employees to conduct testing upon the fill in accord with the policies, practices and procedures Thrasher had created to verify that the fill being used was in compliance with the plans and specifications as set by the project architect and/or engineer, and that the fill was suitable for use on the project, and that the fill was being properly compacted.

28. Thrasher assigned its current employees to conduct testing upon the fill in accord with the policies, practices and procedures Thrasher had created to verify that the fill being used was in in compliance with the plans and specifications as set by the project architect and/or engineer, and that the fill was suitable for use on the project, and that the fill was being properly compacted.

29. The employees Thrasher used were not qualified or competent to conduct testing upon the fill in accord with its policies, practices and procedures.

30. Thrasher failed to properly train its employees to conduct testing upon the fill in accord with its policies, practices and procedures.

31. Thrasher failed to properly supervise its employees to verify that they were properly conducting the testing upon the fill in accord with its policies, practices and procedures.

32. As a result of the above, Thrasher's employees erroneously told Plaintiff and others that the fill was in compliance with the plans and specifications as set by the project architect and/or engineer, and that the fill was suitable for use on the project, and that the fill had been properly compacted.

33. As a result, the fill was used which resulted in earth movement, shifting, cracking, settlement, drainage problems, and damage to other structures and property on site.

34. As a result, Plaintiff has suffered damages in excess of the jurisdictional minimum of this Court.

COUNT III – BREACH OF CONTRACT (THRASHER)

35. Plaintiff asserts, as if fully restated here, its allegations contained in Paragraphs 1-34 of the Complaint.

36. Plaintiff's subrogor, Turner Construction, Inc. contracted with or was in privity of contract with Thrasher.

37. Pursuant to the terms of the contract, Thrasher was to conduct testing to verify that fill provided to the construction site was in compliance with the plans and specifications as set by the project architect and/or engineer, and that the fill was suitable for use on the specific project and/or task, and that the fill was being properly compacted.

38. Thrasher breached the contract by approving fill that was not in compliance with the plans and specifications as set by the project architect and/or engineer and was not suitable for use on the specific project and/or task and had not been properly compacted.

COUNT IV – BREACH OF WARRANTY (THRASHER)

39. Plaintiff asserts, as if fully restated here, its allegations contained in Paragraphs 1-38 of the Complaint.

40. In approving fill for use on the specific project and/or task, Thrasher was making a warranty that the fill was fit for a particular purpose and that the fill was in compliance with the plans and specifications as set by the project architect and/or engineer, and that the fill was suitable for use on the specific project and/or task.

41. In approving the compaction of the fill, Thrasher was making a warranty that the fill had in fact been compacted such that it was fit for a particular purpose and that the fill compaction was in compliance with the plans and specifications as set by the project architect and/or engineer, and that the fill was suitable for use on the specific project and/or task.

42. Ultimately, the fill was not in compliance with the plans and specifications as set by the project architect and/or engineer and was not suitable for use on the specific project and/or task and had not been properly compacted and thus, Thrasher breached its warranties.

43. As a result, Plaintiff has suffered damages in excess of the jurisdictional minimum of this Court.

COUNT V – NEGLIGENCE (MASCARO)

44. Plaintiff asserts, as if fully restated here, its allegations contained in Paragraphs 1-43 of the Complaint.

45. Defendant Mascaro used fill it knew or should have known was not in accord with the plans and specifications as set by the project architect and/or engineer.

46. Defendant Mascaro knew or should have known that the fill it used was not suitable for the work being performed.

47. Defendant Mascaro knew or should have known that the use of the fill at issue would could drainage problems, earth slippage, and damage to other structures and property on site.

48. In spite of the above, Mascaro used the fill.

49. As a result of the Mascaro's actions, Plaintiff has suffered damages in excess of the jurisdictional minimum of this Court.

COUNT VI – CONTRACTUAL INDEMNIFICATION (THRASHER)

50. Plaintiff asserts, as if fully restated here, its allegations contained in Paragraphs 1-49 of the Complaint.

51. Pursuant to Article 8, entitled "Indemnification," of the contract between Turner Construction Company and Thrasher, Thrasher agreed that it would hold harmless Turner Corporation, Turner Construction Company, and Tompkins Builders, Inc. from "all claims, losses, expenses and damages, including but not limited to attorney's fees, arising out of or resulting from the performance of its Services."

52. Zurich American Insurance Company has been forced to issue payments, and may be required to issue additional payments in the future, on behalf of Turner Corporation, Turner Construction Company, and/or Tompkins Builders Inc. as a result of Thrasher's acts and omissions as set forth above.

53. Zurich American Insurance Company, as subrogee of Turner Corporation, Turner Construction Company, and Tompkins Builders Inc., is entitled to indemnification and reimbursement of all of its payments, future payments, and attorney's fees and costs pursuant to Article 8 of the contract.

WHEREFORE, Plaintiff respectfully requests a trial by jury and that this Court enter judgment in its favor, that it award Plaintiff compensatory damages including both economic and non-economic, consequential and inconsequential damages, punitive damages, and all other forms of damages and other relief which this Court finds equitable and just.


Bradley K. Shafer (WV 7794)

1. 1990	1990
2. 1991	1991
3. 1992	1992
4. 1993	1993
5. 1994	1994
6. 1995	1995
7. 1996	1996
8. 1997	1997
9. 1998	1998
10. 1999	1999
11. 2000	2000
12. 2001	2001
13. 2002	2002
14. 2003	2003
15. 2004	2004
16. 2005	2005
17. 2006	2006
18. 2007	2007
19. 2008	2008
20. 2009	2009
21. 2010	2010
22. 2011	2011
23. 2012	2012
24. 2013	2013
25. 2014	2014
26. 2015	2015
27. 2016	2016
28. 2017	2017
29. 2018	2018
30. 2019	2019
31. 2020	2020
32. 2021	2021
33. 2022	2022
34. 2023	2023
35. 2024	2024
36. 2025	2025
37. 2026	2026
38. 2027	2027
39. 2028	2028
40. 2029	2029
41. 2030	2030
42. 2031	2031
43. 2032	2032
44. 2033	2033
45. 2034	2034
46. 2035	2035
47. 2036	2036
48. 2037	2037
49. 2038	2038
50. 2039	2039
51. 2040	2040
52. 2041	2041
53. 2042	2042
54. 2043	2043
55. 2044	2044
56. 2045	2045
57. 2046	2046
58. 2047	2047
59. 2048	2048
60. 2049	2049
61. 2050	2050
62. 2051	2051
63. 2052	2052
64. 2053	2053
65. 2054	2054
66. 2055	2055
67. 2056	2056
68. 2057	2057
69. 2058	2058
70. 2059	2059
71. 2060	2060
72. 2061	2061
73. 2062	2062
74. 2063	2063
75. 2064	2064
76. 2065	2065
77. 2066	2066
78. 2067	2067
79. 2068	2068
80. 2069	2069
81. 2070	2070
82. 2071	2071
83. 2072	2072
84. 2073	2073
85. 2074	2074
86. 2075	2075
87. 2076	2076
88. 2077	2077
89. 2078	2078
90. 2079	2079
91. 2080	2080
92. 2081	2081
93. 2082	2082
94. 2083	2083
95. 2084	2084
96. 2085	2085
97. 2086	2086
98. 2087	2087
99. 2088	2088
100. 2089	2089
101. 2090	2090
102. 2091	2091
103. 2092	2092
104. 2093	2093
105. 2094	2094
106. 2095	2095
107. 2096	2096
108. 2097	2097
109. 2098	2098
110. 2099	2099
111. 2100	2100
112. 2101	2101
113. 2102	2102
114. 2103	2103
115. 2104	2104
116. 2105	2105
117. 2106	2106
118. 2107	2107
119. 2108	2108
120. 2109	2109
121. 2110	2110
122. 2111	2111
123. 2112	2112
124. 2113	2113
125. 2114	2114
126. 2115	2115
127. 2116	2116
128. 2117	2117
129. 2118	2118
130. 2119	2119
131. 2120	2120
1	