

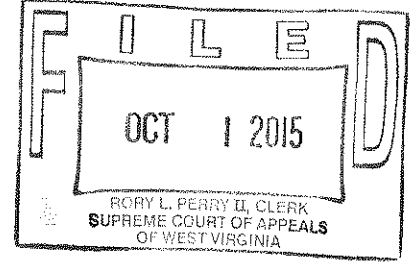
IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No. 14-C-391-2
THOMAS A. BEDELL, Chief Judge



THRASHER ENGINEERING, INC., d/b/a
THRASHER ENGINEERING, a
West Virginia Corporation, and
MASCARO CONSTRUCTION
COMPANY, LP, a foreign entity,

Defendants.

and

THRASHER ENGINEERING, INC
(now THE THRASHER GROUP, INC.)

Defendant/Third-Party Plaintiff,

v.

SKIDMORE, OWINGS & MERRILL, LLP,
GEOCONCEPTS ENGINEERING, INC., and
THURNER CONSTRUCTION COMPANY,

Third-Party Defendants.

TO: THE HONORABLE CHIEF JUSTICE

JUDICIAL MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the *West Virginia Trial Court Rules*, the Honorable Thomas A. Bedell, Chief Judge for the Fifteenth Judicial Circuit, respectfully submits his request that the above-styled Civil Action No. 14-C-391-2, currently pending before the Circuit Court of Harrison County, Division 2, be referred to the Business Court Division.

There has been no Motion to Refer filed jointly or otherwise herein by any of the parties' litigant. This Request is initiated solely by this Honorable Judge presently presiding herein. He verily believes the Business Court Division's process for efficiently managing and resolving litigation involving commercial issues and disputes between businesses is better suited to serve the parties' litigant herein and their various claims.

To the best of this Honorable Judge's knowledge and beliefs based upon his review of the various pleadings filed and procedural matters entertained by this Court to date, the various claims and disputes being asserted in this Civil Action by the respective parties' litigant are deemed by this Court to qualify as "business litigation" pursuant to Trial Court Rule 29.04(a) as they, to-wit:

1. Involve matters of significance to related transactions, operations, or governance between and/or among the entities joined herein.
2. Present commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversies because of the need for specialized knowledge or expertise in the subject matter of familiarity with some specific law or legal principles that may be applicable.
3. Do not involve any particularly identified or defined types of claims, disputes or litigation as collectively identified in Trial Court Rule 29.04(a)(3).

Nature of the Action

The nature of this Civil Action involves or potentially involves a multitude of claims, counterclaims, cross-claims and third-party claims arising out of, to-wit:

- (a) Breach of Contract;
- (b) Commercial Torts;
- (c) Insurance Coverage Disputes in Commercial Insurance Policies;

- (d) Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity;
- (e) Subrogation Assignments and Indemnification.

Basis for this Court's Request to Refer

More particularly, the Plaintiff, Zurich American Insurance Company's, (as subrogee of Turner Construction Company, Turner Corporation, and Tompkins Builders, Inc., foreign corporations, (hereinafter referred to as "Zurich") *First Amended Complaint* avers various claims lying in negligence, breach of contract, breach of warranty and contractual indemnification (with respect to its subrogors) as to the Defendant, The Thrasher Group, Inc.,¹ (hereinafter referred to as "Thrasher") and negligence as to the Defendant, Mascaro Construction Company, LP (hereinafter referred to as "Mascaro").

The genesis of Zurich's *First Amended Complaint* is purportedly a subrogation lawsuit seeking recovery of insurance monies (under a master builder's risk policy) paid (to Turner) to resolve claims arising out of a construction project involving a new office building (Biometric Technology Center) and attendant parking garage and retaining walls (Central Utilities Plant Expansion) at the Federal Bureau of Investigation Criminal Justice Information Services ("FBI CJIS") Division Complex in Harrison County, West Virginia. General contractors working on multiple phases of such construction project included Mascaro and Turner in various capacities and in relation to each other; Thrasher provided various engineering services in regard to this construction; SOM and GeoConcepts respectively performed services as to this construction including project design and geotechnical aspects having been hired by the FBI.

¹ Original pleadings herein identify this particular Defendant as Thrasher Engineering, Inc., d/b/a Thrasher Engineering. Subsequently, such party's pleadings informed this Court that it is now known as The Thrasher Group, Inc.

Mascaro's *Answer To Plaintiffs' First Amended Complaint And Cross-Claim Against Thrasher Engineering, Inc.* avers *inter alia* denial as to Zurich's negligence claim against it and any related guilty conduct asserted and, alternatively, that Thrasher is a joint tortfeasor and with whom it entered into a Standard Subcontract whereby Thrasher agreed to indemnify it from claims arising out of Thrasher's work.

Thrasher filed a combined multiple responsive pleading herein, to-wit:

1. *Answer To First Amended Complaint* which avers *inter alia* denial as to Zurich's various claims against it as well as a multitude of other Defenses thereto.

2. *Counterclaim Against Plaintiff's Subrogor Turner Construction Company* seeking damages for breach of contract or, alternatively, *quantum meruit* averring Turner's unjust enrichment by failing to pay for professional services rendered by it.

3. *Cross-Claim Against Mascaro Construction Company, LP* in the event any liability is found against it that such be apportioned.²

4. *Third-Party Complaint Against Skidmore, Owings & Merrill, LLP, (SOM) And GeoConcepts Engineering, Inc. (GeoConcepts)* which avers *inter alia* various claims including negligence and breach of implied warranty of plans and specifications.

SOM and GeoConcepts responded to Thrasher with its *Third-Party Defendants' Answer To Third-Party Complaint* on September 14, 2015. They aver *inter alia* that GeoConcepts performed a geotechnical investigation of the construction site as well as provided professional geotechnical engineering services on the construction project and that SOM provided professional design services related to such project and that SOM

² It also filed *Defendant Thrasher Engineering, Inc.'s Answer To Defendant Mascaro Construction Company, LP's Cross Claim* in response to Mascaro's previous cross claim.

was contracted with the FBI while denying Thrashers allegations and third-party claims and offering multiple defenses including preemption doctrine.

Thrasher also filed its *Defendant Thrasher Engineering, Inc.'s Counterclaim/Third-Party Complaint Against Turner Construction Company* on September 14, 2015 in keeping with this Court's letter ruling dated August 24, 2015.³

By this Court's *Order Granting Motion For Protective Order And/Or To Stay Or Extend Discovery And Setting Pre-Trial And Scheduling Conference* caused to be entered herein on September 10, 2015, to-wit:

(a) The parties were directed to confer and prepare an agreed upon Protective Order in conjunction with the FBI in order to allow them to conduct meaningful discovery in keeping with the FBI's governmental safety concerns as to any production, use and disclosure of any construction-related activities, related documents or materials covered by contractual confidentiality provisions involving the litigating entities herein.

(b) A Pre-Trial and Scheduling Conference was held on Thursday, September 24, 2015, after the parties herein filed updated Pre-Trial Memorandums, in order to establish the necessary dates and deadlines for further pleadings, development of discovery, dispositive motions, mediation and final preparations for trial by jury. A *Pre-Trial and Scheduling Order* was caused to be entered herein on September 25, 2015 reflecting such agreed upon dates and deadlines.

Several Motions were previously filed by various parties which have been timely addressed and ruled upon by this Court. As result thereof, in part, these proceedings

³ At the time of this Request for Referral's submission, the Plaintiff's Subrogor and Third-Party Defendant, Turner Construction Company, has not yet filed any responsive pleading(s) thereto.

were initially stayed pending engagement of mediation between Zurich and Thrasher in keeping with one of the prior rulings by this Court. Presently, such stay has been lifted and this Court is not aware of any pending Motions in this instant matter. (See subitem (d) hereinbelow *infra*). However, the parties' respective legal counsel have been diligently working together to craft of proposed Stipulated Protective Order in conjunction with legal counsel for the FBI. This matter is still pending.

This Civil Action is deemed by this Honorable Judge to specifically contain novel and/or complex issues which support its general basis for requesting this its referral to the Business Court Division, to-wit:

(a) Highly technical design and architectural documents, plans, specifications as well as involved engineering and testing reports for building projects also involving a federal government entity;

(b) Multiple contracts, plans and specifications relating to remediation of the building structures averred to be damaged;

(c) Detailed accounting records as to construct costs, remediation and other damages; and

(d) Preemption issues that were first informed to this Court in SOM and GeoConcept's *Third-Party Defendants' Pretrial Memorandum* (filed on September 14, 2015) as to dispute resolution procedures involving the *Spearin* doctrine.⁴ This issue is averred to pertain to Turner's contract with the federal government, Mascaro's contract with the federal government and Thrasher's contracts with Turner and Mascaro.

⁴ *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59; 63 L. Ed. 166 (1918) and the "Implied Warranty of Adequacy".

However, it has not yet been formally presented to this Court via dispositive motion for determination by these Third-Party Defendants.

There are no known related civil actions currently pending before this Court and this presiding Judge is unaware of any additional related actions that may be filed in the future. (See n.2 on Page 5 of 8 herein *supra*).

In keeping with the requirements of Rule 29.06(a)(1), copies of various pleadings herein are being provided along with this Request for Referral, to-wit: Zurich's *First Amended Complaint*; Mascaro's *Answer To Plaintiffs' First Amended Complaint And Cross-Claim Against Thrasher Engineering, Inc.*; Thrasher's *Answer To First Amended Complaint, Counterclaim Against Plaintiff's Subrogor Turner Construction Company, Cross-Claim Against Co-Defendant Mascaro Construction Company, LP; Third-Party Complaint Against Skidmore, Owings & Merrill, LLP, And GeoConcepts Engineering, Inc.*; Defendant Thrasher Engineering, Inc.'s *Answer To Defendant Mascaro Construction Company, LP's Cross Claim*; Defendant Thrasher Engineering, Inc.'s *Counterclaim/Third-Party Complaint Against Turner Construction Company*; and SOM and GeoConcept's *Third-Party Defendants' Answer To Third-Party Complaint*; and this Civil Action's docket sheet.

In keeping with Rule 29.06(a)(3), I am providing and serving a true copy of this Request for Referral (sans various pleadings or docket sheet) to all parties herein through their respective legal counsel via first class U. S. Mail as well as directly to the Clerk of the Harrison County Circuit Court. (See Legal Counsel of Record Addendum). I am also providing a true copy of this Request for Referral along with the various pleadings and docket sheet to the Central Office of the Business Court Division via first class U. S. Mail in further keeping therewith.

Conclusion

WHEREFORE, the presiding Judge in this Civil Action, upon the reasons set forth above, respectfully moves Chief Justice Margaret L. Workman to grant his request to refer Harrison County Civil Action No. 14-C-391-2 to the Business Court Division. Even though Turner has yet to timely file any responsive pleading herein, this Honorable Judge believes "good cause" exists for allowing it to proceed with filing and processing its Request for Referral. (See Rule 29.06(a)(2)).

Furthermore, in regard to expedited review, this Court does not request an expedited review under Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with such Rule.

This matter is being respectfully submitted to you on this 29th day of September 2015.

A handwritten signature in black ink, appearing to read 'Thomas A. Bedell', written over a horizontal line.

THOMAS A. BEDELL, Chief Judge
15th Judicial Circuit
Harrison County Circuit Court ~ Division 2

Civil Action No. 14-C-391-2
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