

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

Zurich American Insurance Company, as subrogee
Of TURNER CONSTRUCTION COMPANY,
TURNER CORPORATION, and TOPKINS
BUILDERS, INC., a foreign corporation,

Plaintiffs,

vs.

Civil Action No: 14-C-18
(Judge Bedell)

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

And

MASCARO CONSTRUCTION COMPANY, LP,
A foreign entity,

Defendants.

**DEFENDANT, MASCARO CONSTRUCTION COMPANY, LP'S,
ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT
AND CROSS-CLAIM AGAINST THRASHER ENGINEERING, INC.**

NOW COMES the Defendant, Mascaro Construction Company, LP, by counsel, and in
answer to Plaintiff's First Amended Complaint, states as follows:

1. In response to the allegations contained in Paragraph 1 of Plaintiff's First
Amended Complaint, this Defendant is without sufficient information or belief to either admit or
deny the allegations contained therein, and therefore it denies the same and demands strict proof
thereof.

2. In response to the allegations contained in Paragraph 2 of Plaintiff's First
Amended Complaint, upon information and belief, this Defendant admits that The Thrasher

Group, successor in interest to Thrasher Engineering, is a West Virginia Corporation with a principal place of business at 600 White Oaks Boulevard, Bridgeport, West Virginia 26330.

3. In response to the allegations contained in Paragraph 3 of Plaintiff's First Amended Complaint, this Defendant admits the allegations contained therein.

4. In response to the allegations contained in Paragraph 4 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

5. In response to the allegations contained in Paragraph 5 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

6. In response to the allegations contained in Paragraph 6 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

7. In response to the allegations contained in Paragraph 7 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

8. In response to the allegations contained in Paragraph 8 of Plaintiff's First Amended Complaint, upon information and belief, this Defendant admits that Turner Construction, or one of its affiliates, was the general contractor for phase two of the project.

9. In response to the allegations contained in Paragraph 9 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

10. In response to the allegations contained in Paragraph 10 of Plaintiff's First Amended Complaint, this Defendant admits that it was the general contractor for phase one of the project, which included construction of a parking facility and the placement of fill. This Defendant is without sufficient information or belief to admit or deny allegations concerning phase two activities or design requirements, and therefore it denies the same and demands strict proof thereof. All other allegations contained in this paragraph are denied and strict proof thereof is demanded.

11. In response to the allegations contained in Paragraph 11 of Plaintiff's First Amended Complaint, this Defendant admits the allegations contained therein.

12. In response to the allegations contained in Paragraph 12 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained therein and demands strict proof thereof.

13. In response to the allegations contained in Paragraph 13 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained therein and demands strict proof thereof.

14. In response to the allegations contained in Paragraph 14 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

15. In response to the allegations contained in Paragraph 15 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

16. In response to the allegations contained in Paragraph 16 of Plaintiff's First Amended Complaint, this Defendant is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

COUNT I – NEGLIGENCE (THRASHER)

17. In response to the allegations contained in Paragraph 17 of Plaintiff's First Amended Complaint, this Defendant restates and incorporates its answers to Paragraphs 1 through 16 hereinabove as if fully set forth herein.

18. In response to the allegations contained in Paragraph 18 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

19. In response to the allegations contained in Paragraph 19 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or

deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

20. In response to the allegations contained in Paragraph 20 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

21. In response to the allegations contained in Paragraph 21 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

22. In response to the allegations contained in Paragraph 22 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

23. In response to the allegations contained in Paragraph 23 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any

allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

24. In response to the allegations contained in Paragraph 24 of Plaintiff's First Amended Complaint, this Defendant admits that Thrasher inspected and approved all fill placed.

25. In response to the allegations contained in Paragraph 25 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

COUNSEL II – NEGLIGENT HIRE, RETENTION AND SUPERVISION (THRASHER)

26. In response to the allegations contained in Paragraph 26 of Plaintiff's First Amended Complaint, this Defendant restates and incorporates its answers to Paragraphs 1 through 25 hereinabove as if fully set forth herein.

27. In response to the allegations contained in Paragraph 27 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

28. In response to the allegations contained in Paragraph 28 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

29. In response to the allegations contained in Paragraph 29 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

30. In response to the allegations contained in Paragraph 30 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

31. In response to the allegations contained in Paragraph 31 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or

deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

32. In response to the allegations contained in Paragraph 32 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

33. In response to the allegations contained in Paragraph 33 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

34. In response to the allegations contained in Paragraph 34 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained therein and demands strict proof thereof.

COUNT III – BREACH OF CONTRACT (THRASHER)

35. In response to the allegations contained in Paragraph 35 of Plaintiff's First Amended Complaint, this Defendant restates and incorporates its answers to Paragraphs 1 through 34 hereinabove as if fully set forth herein.

36. In response to the allegations contained in Paragraph 36 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

37. In response to the allegations contained in Paragraph 37 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

38. In response to the allegations contained in Paragraph 38 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

COUNT IV – BREACH OF WARRANT (THRASHER)

39. In response to the allegations contained in Paragraph 39 of Plaintiff's First Amended Complaint, this Defendant restates and incorporates its answers to Paragraphs 1 through 38 hereinabove as if fully set forth herein.

40. In response to the allegations contained in Paragraph 40 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

41. In response to the allegations contained in Paragraph 41 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

42. In response to the allegations contained in Paragraph 42 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

43. In response to the allegations contained in Paragraph 42 of Plaintiff's First Amended Complaint, this Defendant denies that the Plaintiff has suffered and damage and demands strict proof thereof.

COUNT V – NEGLIGENCE (MASCARO)

44. In response to the allegations contained in Paragraph 44 of Plaintiff's First Amended Complaint, this Defendant restates and incorporates its answers to Paragraphs 1 through 43 hereinabove as if fully set forth herein.

45. In response to the allegations contained in Paragraph 45 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained in Paragraph 45 of Plaintiffs' First Amended Complaint and demands strict proof thereof.

46. In response to the allegations contained in Paragraph 46 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained in Paragraph 45 of Plaintiffs' First Amended Complaint and demands strict proof thereof.

47. In response to the allegations contained in Paragraph 47 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained in Paragraph 45 of Plaintiffs' First Amended Complaint and demands strict proof thereof.

48. In response to the allegations contained in Paragraph 48 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained in Paragraph 45 of Plaintiffs' First Amended Complaint and demands strict proof thereof.

49. In response to the allegations contained in Paragraph 49 of Plaintiff's First Amended Complaint, this Defendant denies the allegations contained in Paragraph 45 of Plaintiffs' First Amended Complaint and demands strict proof thereof.

COUNT VI – CONTRACTUAL INDEMNIFICATION (THRASHER)

50. In response to the allegations contained in Paragraph 50 of Plaintiff's First Amended Complaint, this Defendant restates and incorporates its answers to Paragraphs 1 through 49 hereinabove as if fully set forth herein.

51. In response to the allegations contained in Paragraph 51 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

52. In response to the allegations contained in Paragraph 52 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

53. In response to the allegations contained in Paragraph 53 of Plaintiff's First Amended Complaint, this Defendant states that this Paragraph does not contain any allegations against this Defendant for which a response is required. To the extent this Paragraph asserts any allegations against this Defendant, it is without sufficient information or belief to either admit or deny the allegations contained therein, and therefore it denies the same and demands strict proof thereof.

54. In response to the Prayer Paragraph contained in Plaintiff's First Amended Complaint, this Defendant denies that the Plaintiff is entitled to any of the relief requested therein.

55. This Defendant denies all allegations not specifically admitted herein.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiff's First Amended Complaint fails to state a cause of action against this Defendant upon which relief can be granted.

SECOND DEFENSE

This Defendant was not guilty of any act or omission which proximately caused or contributed to the incidents alleged in the Plaintiff's First Amended Complaint.

THIRD DEFENSE

Plaintiff's claims may be barred in whole or in part as a result of comparative and contributory fault and assumption of risk by Plaintiff and/or its subrogees.

FOURTH DEFENSE

The incident as alleged in the First Amended Complaint was caused solely by the negligence, fault, or other conduct of a third-party or entity who may or may not be a party to this civil action.

FIFTH DEFENSE

The incident as alleged in the First Amended Complaint was caused solely by the joint and concurrent negligence of the Plaintiff and parties to this action other than this Defendant.

SIXTH DEFENSE

The Plaintiff's cause of action against this Defendant is barred by intervening and/or superseding events that were the proximate cause of the incident as alleged in Plaintiff's First Amended Complaint.

SEVENTH DEFENSE

The Defendant reserves unto itself the affirmative defenses as may prove applicable as discovery proceeds and the evidence is developed in this case, including, but not limited to, assumption of risk, contributory negligence, release, accord and satisfaction, waiver, estoppel, statute of limitations, lack of personal and subject matter jurisdiction, lack of venue, and any other matter which constitutes an avoidance of liability or affirmative defense.

EIGHTH DEFENSE

This Defendant hereby invokes any and all affirmative defenses applicable in the defense of the claims asserted herein and against him by the Plaintiff as may be relevant or pertinent and justified and established by the facts and circumstances hereof or may be developed through discovery. Such affirmative defenses are as contemplated and/or set forth in Rules 8 and 12 of the West Virginia Rules of Civil Procedure and any and all matters constituting an avoidance or affirmative defense as contemplated by Rules 8 and 12 of the West Virginia Rules of Civil Procedure.

NINETH DEFENSE

If the Plaintiff receives judgment against this Defendant, jointly or severally, this Defendant is entitled to contribution and/or indemnity against those parties found liable for their proportionate share of liability, if any.

WHEREFORE, having answered Plaintiffs' First Amended Complaint, Defendant moves this Court to dismiss the same, award its costs and expenses incurred in defending the same and for such other and further relief as this Court deems just.

DEFENDANT DEMANDS TRIAL BY JURY.

CROSS-CLAIM AGAINST THRASHER ENGINEERING

NOW COMES the Defendant, Mascaro Construction Company, LP ("Mascaro"), by counsel, and for its Cross-Claim against Thrasher Engineering does hereby state as follows:

1. That Plaintiff has filed suit against this Defendant alleging that it is liable to Plaintiff for injuries and damages, which are more particularly described in Plaintiff's First Amended Complaint.

2. That Mascaro denies that it was guilty of any conduct described in Plaintiff's First Amended Complaint giving rise to any theory of liability, which proximately caused or contributed to the damages alleged in Plaintiff's First Amended Complaint, but avers that Plaintiff's damages, if any, were the proximate result of the conduct of Plaintiff and/or Thrasher Engineering.

3. In the alternative, Mascaro denies it was guilty of any conduct which proximately caused or contributed to the damages described in Plaintiff's First Amended Complaint, but if Mascaro is found guilty of any conduct proximately causing or contributing to Plaintiff's damages, such conduct would be secondary and passive compared to the primary and active conduct of Thrasher Engineering.

4. In the alternative, Mascaro avers that Thrasher Engineering is a joint tortfeasor whose conduct combined with the alleged conduct of Mascaro proximately caused or contributed to the damages of Plaintiff.

5. Mascaro is entitled contribution and implied indemnity from Thrasher Engineering.

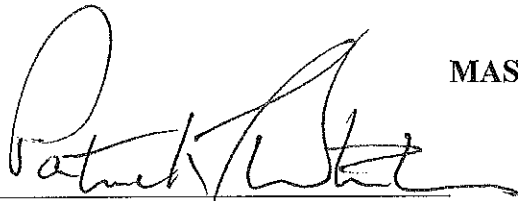
6. Mascaro and Thrasher Engineering entered into a Standard Subcontract on or about March 18, 2010. *See Thrasher Subcontract, a copy of which is attached hereto as Exhibit A.*

7. Under the terms of the Standard Subcontract, Thrasher Engineering agreed to "fully indemnify, defend and hold harmless" Mascaro from claims arising out of Thrasher Engineering's work. *See Thrasher Subcontract at p.8, ¶25.*

8. The claims asserted in the Plaintiff's First Amended Complaint pertaining to the use, selection, and compaction of unsuitable fill materials directly arise out of Thrasher Engineering's work on the project.

9. Mascaro is entitled to express indemnification from Thrasher Engineering.

WHEREFORE, Mascaro Construction Company, LP respectfully requests that this Court enter judgment against Thrasher Engineering for the amount of any judgment recovered by Plaintiff herein against Mascaro, including costs, expenses and attorneys' fees, and demands indemnification and contribution from Thrasher Engineering for any recovery against Mascaro.



MASCARO CONSTRUCTION COMPANY, LP

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