FILED

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2021 APR 21 PM 1:28

JOSEPH M. BUCK

AXIALL CORPORATION and WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

Civil Action No.: 19-C-59
Presiding Judge Wilkes
Resolution Judges Carl and Nines

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO WITHDRAW, OR IN THE ALTERNATIVE, ALTER OR AMEND THE COURT'S FEBRUARY 12, 2021 ORDER

This matter came before the Court this 21st day of April 2021. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation, have filed Plaintiffs' Motion to Withdraw Or, In The Alternative, Alter or Amend The Court's February 12, 2021 Order Granting Defendants' Motion to Dismiss Counts II (*Hayseeds* Damages), IV and V of Plaintiffs' Complaint.

The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), by counsel, Jeffrey V. Kessler, Esq., and Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company (hereinafter "Defendants" or "Insurers"), by counsel, James A. Varner, Sr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and

legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds an insurance coverage dispute involving Defendants' alleged failure to cover Plaintiff Westlake Chemical Corporation for property damage at its Marshall County, West Virginia plant caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling. *See* Pl's Resp. to Def's Mot. for Ltd. Clarification, p. 2.

2. On a prior day, Plaintiffs filed the instant Plaintiffs' Motion to Withdraw Or, In The Alternative, Alter or Amend The Court's February 12, 2021 Order Granting Defendants' Motion to Dismiss Counts II (*Hayseeds* Damages), IV and V of Plaintiffs' Complaint, arguing that the Court should enter an Order withdraw its February 12, 2021 Order and defer ruling on the choice of law issue until a full evidentiary record on the disputed facts has been developed in discovery. *See* Def's Mem., p. 3. Alternatively, Plaintiffs request "that the Order be amended or altered such that the incorrect statements regarding purportedly undisputed facts – specifically, facts regarding the origin, drafting and negotiation of the relevant policies – are stricken. *Id.*

3. On a prior day, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion to Withdraw Or, In The Alternative, Alter of Amend the Court's February 12, 2021 Order Granting Defendants' Motion to Dismiss, arguing the instant motion should be denied because the Court did not make an error of law and there is no obvious injustice to

correct, and that not one argument in the motion warrants changing the Court's February 12, 2021 ruling. *See* Def' Resp., p. 2, 3.

4. On a prior day, Plaintiffs filed their Reply, reiterating its arguments and requested relief, and arguing Defendants have conceded that Plaintiffs are entitled to their second, alternative request for relief because Defendants stated in the Response they would not object to the removal of a sentence regarding Plaintiffs drafting the language of the policies. *See* Reply.

5. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

This matter comes before the Court upon a motion to alter judgment brought pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Rule 59(e) simply states that "[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment". W. Va. R. Civ. P. 59.

Further, the West Virginia Supreme Court of Appeals has provided guidance on when a trial court should grant a Rule 59(e) motion to alter or amend. Specifically, in syllabus point 2 of *Mey v. Pep Boys–Manny, Moe & Jack,* 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals said:

> A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Syl. pt. 1, *Acord v. Colane Company,* 228 W.Va. 291, 719 S.E.2d 761 (2011); *see also Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351, 356 (2012).

Also, a motion to alter or amend judgment may be used to correct manifest errors of law or fact or to present newly discovered evidence. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011).

In the present case, none of the grounds for reconsideration are present. The Court, after review of the pleadings and the briefing on the underlying motion, as well as the Complaint, finds there are no manifest errors of law or fact to be corrected. The Court considered all the matters before the Court in the briefing on the underlying motion to dismiss to come to its ultimate conclusion that because of the valid Georgia choice-of-law provision, Plaintiffs cannot, in addition to bringing claims under Georgia law, also press claims under West Virginia law. In doing so, the Court concluded that Plaintiffs could not pursue both Georgia and West Virginia claims, and properly dismissed the West Virginia counts.

The Court analyzed the choice of law provision. The Court addresses Plaintiffs' first argument, that its conclusion on page 6 of its Order erroneously found as follows:

> As an initial matter, it is undisputed by the parties in this matter the relevant policy(ies) contain a valid choice of law provision setting forth that Georgia law is to apply to all claims against Defendants. *See* Defs' Mot., p. 2; *see also* Pl's Resp., p. 11.

See Pl's Mem., p. 5.

Here, the Court concluded that neither party disputed that the choice of law provision is valid. Further, the choice of law provision, by its own express language and wording, provides that "[a]ny dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia". *See* Compl, ¶19. It is clear that this language covers all claims related to the Insurance and Georgia law must apply in this litigation. Therefore, the Court properly concluded that it is undisputed that the relevant policy(ies) contain a valid choice of law provision setting forth that Georgia law is to apply to "[a]ny dispute concerning or related to this

insurance". *See* Compl, ¶19. The Court further notes that all the claims in the instant civil litigation surround the Insurance. Accordingly, Plaintiffs have not met their burden to demonstrate a clear error of law was made regarding this conclusion of law.

Further, the Court addresses Plaintiffs' second argument, that the court erroneously stated the following as conclusions of law:

> The Court considers that the parties, both sophisticated parties, negotiated and chose Georgia to apply to all claims in the relevant choice-of-law provision. Defendants have proffered that the policy is a manuscript policy, meaning its terms were negotiated rather than "offered on a take it or leave it basis". *See* Defs' Mem., p. 2. Further, Defendants proffered that Plaintiff Axiall was headquartered in Atlanta, Georgia at the time the policy was issued (while none of the Defendants were headquartered in Georgia), and whose broker actively participated in the policy's wording. *Id.* at 2, 5.
>
> For their part, Plaintiffs do not dispute this. *See* Pl's Resp., p. 8, 11.

See Pl's Mem., p. 6.

The Court considered the underlying motion to dismiss, response, and reply, as elicited by the Court's briefing order. The Court noted in its conclusion that "Defendants *have proffered* that the policy is a manuscript policy....", citing to the page number from the Defendants' memorandum in support of the underlying motion to dismiss. (emphasis added).

While the Court is mindful of the law's requirement to not consider matters outside of the Complaint at the motion to dismiss stage, it properly considered the pleadings. The Court did not state as a matter of law that that the policy is a manuscript policy, or that Axiall was headquartered in Atlanta, Georgia, that none of the Defendants were headquartered in Georgia, or that Axiall's broker actively participated in the policy's wording; rather, it noted "*Defendants have proffered*" those statements in its memorandum in support of the underlying motion to

dismiss. (emphasis added). The Court made the observation that those facts were cited in Defendants' memorandum. Further, a mere recitation of what the parties provide in their pleadings in a memorandum/motion to dismiss does not necessarily mean the Court relied on them in deciding the motion to dismiss.

Regarding the statement in the next sentence – "For their part, Plaintiffs do not dispute this. *See* Pl's Resp., p. 8, 11." – the Court noted that Defendants' did not dispute this in their briefing on the underlying motion. The Response is the nonmoving party's opportunity to respond to each of the points proffered by the movant in the motion/memorandum. The Plaintiffs addressed the issue of who was the drafter of the policy, as well as the validity of the policy, in its Response. The Court explains as follows.

On page 11 of the Response to the underlying motion (which the Court cited to), Plaintiffs stated twice that they agreed the choice of law provision was valid. First, Plaintiffs stated in the second paragraph on page 11, "Instead, they argue against the straw-man position purportedly being espoused by Westlake that the Georgia governing law provision is not valid or enforceable (in fact, all parties agree that it is both)." Then, in the heading for Section A which is located on page 11, Plaintiffs stated "A Valid and Enforceable Governing Law Provision....". In that vein, the parties chose Georgia to apply to claims in the choice-of-law provision that was ultimately selected and included in the policy(ies).

Next, the Court cited to page 8 of Plaintiffs' Response to the underlying motion. On page 8 of the Response, Plaintiffs acknowledged Defendants' motion's "argument that Westlake drafted the language of the Insurer's policies, including the governing law provision in each of the policies...". Plaintiffs did not dispute this argument in its briefing on the instant motion by stating that it was not involved in the drafting of the provision or averring its own recitation of

the negotiation of the contract in response to that proffered by Defendants in the motion. The Court recognizes that Plaintiffs did aver in the Response on page 8 that that particular argument of Defendants' was not supported by the allegations in Westlake's own Complaint. However, whether Plaintiffs drafted the language of the policies, including the choice-of-law provision, or someone else did[1], the Court's ruling that the effect of the valid Georgia choice-of-law provision shall apply to all claims in this matter, that Plaintiffs cannot also, in addition to that, press claims under West Virginia law, and because Plaintiffs cannot pursue both Georgia and West Virginia claims, the West Virginia counts must be dismissed remains unchanged. Whether Plaintiff or someone else drafted the choice-of-law provision, the Court still finds such choice-of-law provision is valid and enforceable, unambiguous, and governs "[a]ny dispute concerning or related to this insurance". *See* Compl, ¶19. To be clear, the Court found that such valid and enforceable provision *exclusively* governs "[a]ny dispute concerning or related to this insurance" (*See* Compl, ¶19), which the Court finds encompasses all disputes in the instant civil action. Who drafted the language does not alter this conclusion. Because of this, no clear error of law has been demonstrated, and the Court finds it will not alter or amend its February 12, 2021 Order.

In conclusion, the Court DENIES the instant Motion.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion to Withdraw Or, In The Alternative, Alter or Amend The Court's February 12, 2021 Order

[1] Plaintiffs final argument in the instant motion regards the very next sentence on page 6 of the Court's February 12, 2021 Order, "Plaintiffs state in their Response that Plaintiffs drafted the language of the policies, including the choice of law provision. *See* Pl's Resp., p. 8."

Granting Defendants' Motion to Dismiss Counts II (*Hayseeds* Damages), IV and V of Plaintiffs' Complaint is hereby DENIED.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

JUDGE CHRISTOPHER C. WILKES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

A Copy Teste:
Joseph M. Rucki, Clerk
By /s/ Donna Crouse Deputy