

FILED

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

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 GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING DEFENDANTS' "CONTAMINATION" EXCLUSION
DEFENSE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
CONCERNING ENFORCEMENT OF ENDORSEMENT NO. 1 AND NATIONAL
UNION ENDORSEMENT NO. 19**

This matter came before the Court this 19th day of November 2021, upon Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, David R. Osipovich, Esq. and 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 (hereinafter “Plaintiff” or “Westlake”) for property damage at its Marshall County, West Virginia plant (referred to by the parties as the Natrium Plant) caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl.; *see also* Pl’s Mem., p. 1-2, 9; Defs’ Resp., p. 1-2. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling.

2. The thirteen insurance policies at issue in this matter (the “Policies”) are all part of a commercial property insurance program that Axiall purchased from the Insurers for substantial premiums. *See* Pl’s Mem., p. 1. The Policies contain multiple endorsements. At issue in the instant motion are Endorsement No. 1 regarding a “seepage and/or pollution and/or contamination” exclusion and Endorsement No. 19¹ regarding a “pollution, contamination, debris removal” exclusion. *Id.*

3. Insurers notified Plaintiffs that various exclusions, including the “contamination” exclusions at Endorsement Nos. 1 and 19, “may exclude or limit coverage” for Westlake’s claim. *Id.* at 2. In the instant motion for partial summary judgment filed by Westlake, Westlake seeks a

¹ This exclusion utilized by Defendant AIG. *Id.* at 2.

declaration that neither of these exclusions – referred to by the parties as “contamination” exclusions – apply to Westlake’s insurance claim because the exclusions are intended to address environmental pollution, and not damage to equipment caused by an industrial accident, arguing the endorsements do not apply to the type of event at issue in the case at bar, “a chlorine chemical attack resulting from a sudden and accidental event like the Tank Car Rupture”. *Id.* at 1, 3-4, 10, 13.

4. On or about October 7, 2021, Defendants filed Defendants’ Response in Opposition to Plaintiffs’ Motion for Partial Summary Judgment Regarding Defendants’ “Contamination” Exclusion Defense, arguing that Plaintiffs are incorrect that the two policy endorsements at issue in this motion precluding coverage for contaminants or pollutants apply only to environmental harm. *See* Defs’ Resp., p. 2.

5. On or about October 21, 2021, Plaintiffs filed their Reply Brief in Support of Plaintiffs’ Motion for Partial Summary Judgment Regarding Defendants’ “Contamination” Exclusion Defense.

6. Meanwhile, on or about September 16, 2021, Defendants filed Defendants’ Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19, arguing Plaintiffs’ claims fall squarely within the exclusionary language of Endorsement No. 1 and National Union Endorsement No. 19, and requesting judgment as a matter of law that Plaintiffs’ claim is excluded from coverage under those endorsements. *See* Def’s Mot., p. 3.

7. On a prior day, Plaintiffs submitted Responses, and the Court notes it entered an Order granting leave for Plaintiffs to file amended responses to correct citations and references to the record. On or about October 21, 2021, Plaintiffs filed Plaintiffs’ Amended Brief in

Opposition to Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19, requesting that Defendants' motion for summary judgment be denied, and reiterating its arguments from its own motion for partial summary judgment on the issue of contamination. *See* Pl's Resp.

8. On or about October 21, 2021, Defendants filed Defendants Reply Memorandum in Support of Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19.

9. The Court also considered Statements of Material Facts submitted by both Plaintiffs and Defendants.

10. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment filed by Plaintiffs and a motion for summary judgment filed by Defendants. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to

clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

In deciding both the motion for partial summary judgment filed by Plaintiffs and the motion for summary judgment filed by Defendants, the Court is tasked with deciding whether a policy exclusion for “seepage and/or pollution and/or contamination” found at Endorsement No. 1 and a policy exclusion for “pollution, contamination, debris removal” exclusion found only in Endorsement No. 19 of National Union/Defendant AIG’s Policy².

The “contamination” exclusion in Endorsement No. 1 provides:

Notwithstanding any provision in the Policy to which this Endorsement is attached, this Policy does not insure against loss, damage, costs or expenses

² The Court notes it has been proffered that the “Policies” are the thirteen All Risk commercial property insurance policies issued by the Insurers to Axiall for the November 19, 2015 to November 19, 2016 policy period, with limits of liability totaling \$650 million, and which divided into quota shares among the policies and total 100%. There are thirteen Policies but only twelve Defendant Insurers because Defendant National Union Fire Insurance Company of Pittsburgh, Pa., an AIG insurer (“AIG”) issued two policies, one out of its U.S. underwriting arm (the “AIG-US Policy”), and one out of its U.K. underwriting arm (the “AIG-UK Policy”). See Pls’ Mem., p. 1.

in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.

...

However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.

See Pls' Mem., p. 3, 4, 6; *see also* Def's Resp., Ex. A.

Endorsement No. 19 of AIG-US Policy No. 020786808 states in pertinent part: This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy. *See* Pls' Mem., p. 8; *see also* Def's Resp., Ex. A.

Plaintiffs argue that the exclusionary language contained in Endorsement No. 1 containing the phrase "seepage and/or pollution and/or contamination" refers to types of environmental impairment, not to physical loss or damage to operating equipment or other insured property from a sudden and accidental event like the tank car rupture. *See* Pls' Mem., p. 3. Defendants aver this position is wrong that the clause should be applied outside the context of traditional environmental pollution. *See* Def's Resp., p. 2. Further, Defendants argue the Policies do "not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination", and that means the Policies exclude contamination and pollution regardless of the type, regardless of whether such contamination or pollution is characterized as "environmental impairment." *Id.*

The Court agrees with Plaintiffs and finds the exclusion set forth in Endorsement No. 1 clearly and unambiguously does not apply to Westlake's claim. The Court finds that instead the language was clearly designed to address environmental pollution or contamination, which is not at issue here. *See* Pl's Mem., p. 5. Plaintiffs have proffered to the Court that the phrase "seepage and/or pollution and/or contamination" is found only in Endorsement No. 1 of the Policies, and is not defined anywhere in the Policies. *See* Pls' Mem., p. 6. The Court considers the fact that Endorsement No. 1 includes a section titled "Pollutant Cleanup and Removal (Land & Water). *See* Def's Resp., Ex. A. Further Endorsement No. 1 contains "Authorities Exclusion" provision (which provides that fines imposed by a governmental authority are not covered) indicates that "seepage, "pollution," and "contamination" are all deemed to be forms of "environmental impairment":

This Policy does not cover expenses, fines, penalties or court costs, incurred or sustained by the Insured or imposed on the Insured at the order of any government agency, court or other authority, in connection with any kind or description of environmental impairment, including seepage or pollution or contamination from any cause.

As such, the Court finds "seepage, pollution or contamination" refers to impairment of land, air or bodies of water, and not operating equipment or other property at the Natrium Plant.

However, even if the Court found that that the chlorine cloud that was released by the tank car rupture was deemed to constitute "seepage and/or pollution and/or contamination" the exclusion at Endorsement No. 1 contains the following sentence:

However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.

See Def's Resp., Ex. A.

In this case, the tank car at issue was owned by Axiall and constituted insured property under the Policies. Likewise, the chlorine product contained within the tank car at the time of the rupture was insured property under the Policies. The tank car and the released chlorine were indisputably the subject of direct physical loss or damage when the tank car suddenly ruptured. The sudden and accidental rupture of the tank car is a peril that is not excluded – and thus is covered – under the Insurers’ All Risk Policies. Accordingly, even if the rupture of the tank car on August 27, 2016 resulted in “seepage and/or pollution and/or contamination,” within the meaning of Endorsement No. 1, which the Court did not find, any physical loss or damage caused thereby is not excluded – but rather is expressly covered – under the unambiguous, plain language of this exception to the exclusion in Endorsement No. 1.

The Court next addresses Endorsement No. 19. Viewed in its entirety, Endorsement No. 19, titled “Pollution, Contamination, Debris Removal Exclusion Endorsement” also is clearly designed to address environmental pollution or contamination, which is not at issue here.

Endorsement No. 19 states in pertinent part: This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy. *See* Pls’ Mem., p. 8; *see also* Def’s Resp., Ex. A.

Like Endorsement No. 5, the Court finds this provision is clearly designed to address environmental pollution or contamination. As an initial matter, Endorsement No. 19 does not state that it deletes and replaces or supersedes the coverage provided seepage, pollution and contamination in the two exceptions to the exclusion in Endorsement No. 1. *See* Pl’s Mem., p. 8. The express language in the last sentence of Endorsement No. 19 provides that “[a]ll other terms,

conditions, and exclusions of this policy remain unchanged.” *Id.* at 8-9. The broker for the AIG-US Policy, Michael Perron of Willis, testified that Endorsement No. 19 does not operate to exclude any contamination-related loss or damage beyond that which is excluded in Endorsement No. 1, or any other part of the policy, because the last sentence of Endorsement No. 19 expressly preserves coverage otherwise provided or not excluded in the policy. *Id.* at 9. Further, AIG’s corporate representative testified that there is nothing from Westlake’s claim that is excluded under Endorsement No. 19 that is beyond what is excluded under Endorsement No. 1 in the Insurers’ view. *Id.*

Like Endorsement No. 1, Endorsement No. 19 contains sections which reference debris removal, governmental pollution laws, and land and water. Specifically, Endorsement No. 19 contains a “Debris Removal Exclusion” section, which provides, *inter alia*, that AIG “will not pay the expense to: a) Extract contaminants or pollutants from the debris; or b) Extract contaminants or pollutants from land or water; or c) Remove, restore or replace contaminated or polluted land or water;” *Id.* at 19. Further, like Endorsement No. 1, Endorsement No. 19 contains an “Authorities Exclusion,” which excludes coverage for fines, penalties or other costs imposed on the Insured by order of a government agency. *Id.*

Thus, upon the Court’s review of Endorsement No. 19, when read in its entirety, the unambiguous language of Endorsement No. 19 makes it clear that it is intended to apply to loss or damage in the form of environmental impairment to land, air or bodies of water – not to a sudden tank rupture leading to damage to property and equipment in the manner that occurred in the case at bar.

Finally, the Court notes there is argument in Plaintiffs’ motion regarding whether Endorsement No. 19 was properly bound to Axiall’s Policies. *See* Pls’ Mem., p. 8. Because the

Court finds that the contamination exception contained in Endorsement No. 19 would not exclude Plaintiffs' claims, this Court does not need to address the issue of whether or not Endorsement No. 19 was properly added to Axiall's Policies.

For all of these reasons, the Court finds that summary judgment must be granted in Plaintiffs' favor, and against Defendants, on the Defendants' corrosion exclusion defense. The Court finds that Defendants' motion for summary judgment must be denied. Further, the Court finds that Plaintiffs' motion for partial summary judgment must be granted. The Court further hereby grants Plaintiffs' request for a declaration that Endorsement No. 1 of the Policies and Endorsement No. 19 of the AIG-US Policy have no applicability to Westlake's claim for coverage at issue in this case.

Further, the Court also grants Plaintiffs' request that the Court dismiss the Defendants' affirmative defenses based on Endorsement Nos. 1 and 19, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, and finds said Seventeenth Defense shall be stricken.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Defendants' affirmative defenses based on Endorsement Nos. 1 and 19, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, are hereby STRICKEN.

It is further hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No.

19 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:

By  Deputy
Joseph M. Rucki, Clerk