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' "FAULTY WORKMANSHIP" EXCLUSION DEFENSE AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CONCERNING ENFORCEMENT OF FAULTY WORKMANSHIP EXCLUSION

This matter came before the Court this 19th day of November 2021, upon Plaintiffs Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion. 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, 6; Def's Mem., p. 2-3. 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. 3. The Policies contain multiple endorsements. At issue in the instant motion is Section 3.D of the Policies, which reads as follows:

> D. Loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship. This exclusion does not apply to resultant physical loss or damage not otherwise excluded.

Id. at 11; *see also* Defs' Resp., p. 4.

3. Section 3.D is referred to as the parties as the "Perils Excluded" section. *Id.*

4. In the instant motion, Westlake seeks partial summary judgment in its favor on the Insurers' "faulty workman" exclusion defense, arguing the faulty workmanship exclusion

that operates to bar coverage for all damage that results from faulty workmanship would not apply here even if the tank car rupture originated with negligent maintenance work that certain third parties, Rescar, Inc., AllTranstek, LLC and Superheat, FGH Services, Inc.[1] performed on the tank car because the exclusion includes an ensuing loss provision that affords coverage for damage caused by a covered peril that results from faulty workmanship. *Id.* at 1-2, 4.

5. On or about October 7, 2021, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense, arguing the motion should be denied because Plaintiffs' claim/position that the ensuing loss provision applies because faulty workmanship resulted in a covered peril is wrong legally and factually. *See* Defs' Resp., p. 2.

6. On or about October 21, 2021, Plaintiffs filed their Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense.

7. Meanwhile, on or about September 16, 2021, Defendants filed Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion, arguing Plaintiffs claim that the Policy cover replacement of instrumentation, electronics, and metal lagging and banding in certain areas of the Natrium Plant because chlorine contamination has caused or will cause corrosion should be denied because all of the claimed damages result from faulty workmanship. *See* Def's Mem., p. 2. Specifically, Defendants argue the faulty inspection, maintenance and repair work of third-parties AllTranstek LLC, Rescar, Inc. t/d/b/a Rescar Companies, and Superheat FGH Services, Inc. performed on the tank car which ruptured

[1] The parties refer to these entities as maintenance vendors.

causes Section 3.D of the Policies to preclude coverage for all of the loss, damage, and expense caused by or resulting from those entities' faulty workmanship. *Id.* at 4, 9.

8. 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 Faulty Workmanship Exclusion, 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 faulty workmanship. *See* Pl's Resp.

9. On or about October 21, 2021, Defendants filed their Memorandum in Support of Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion, reiterating its position that its motion should be granted and arguing that the ensuing loss exception to the faulty workmanship exclusion does not apply. *See* Reply, p. 5, 6.

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

11. 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 faulty workmanship contained in Section 3.D of the Policies applies to Plaintiffs' claimed damages and precludes Plaintiffs' claims for damages.

Section 3 of the Policies includes the following language:

> This policy does not insure against loss, damage or expense caused by or resulting from:
>
> ***
>
> D. Loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship. This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]

See Exhibit G to Defendants' Motion, at pp. 14-15 of 65.

Defendants aver that the fact that Axiall filed two different civil actions against the third-party maintenance vendors alleging their negligent acts and omissions in their work on the railroad car caused the rupture and chlorine release make clear that all the damages it seeks in this insurance coverage litigation which it has alleged are the direct and proximate result of the faulty workmanship are excluded. *See* Def's Mem., p. 4-5, 14-15.

Plaintiffs contend that even if the negligence was the first event in the chain of causation resulting in the tank car rupture and consequent damage to the Natrium Plant, that is even if the faulty workmanship exclusion had any application here, the exclusion would not operate to bar coverage because it includes an "ensuing loss" provision that affords coverage for damage caused by a covered peril that results from, or ensues from, faulty workmanship. *See* Pl's Mem., p. 1. The last sentence of Section 3.D, which states, "This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]", is what Plaintiffs refer to as the "ensuing loss" provision. *Id.* at 5, 11-12, 13-14.

Plaintiff proffered that Defendant AIG's 30(b)(7) representative on underwriting topics, David Oliver, explained the meaning of an ensuing loss provision as follows:

> Q What's an ensuing loss provision?

> A Ensuing loss is where coverage is provided for a subsequent -- for subsequent loss or damage caused by a peril that's not otherwise excluded. So if it's [sic] an excluded peril causes a primary event and there was a subsequent event to that, in other words, an ensuing peril that's not otherwise excluded, then we would provide coverage for the damage due to that ensuing peril only.

See Pls' Mem., p. 5-6.

AIG's underwriting manual declares that "[e]nsuing loss provisions in exclusions are common...." *Id.* at 6. Moreover, as evidenced by the Insurers' standard insuring forms (sometimes referred to as "specimen" forms), exclusions like Section 3.D typically – if not always – include ensuing loss provisions. *Id.*

Specifically, Plaintiffs contend that the maintenance vendors' negligent work on a tank car, their poorly executed weld repairs and post-weld treatment, weakened certain sections of the railcar's tank wall, making it more susceptible to cracking. *Id.* at 2. However, Plaintiffs contend that coverage is preserved when faulty workmanship itself gives rise to a covered cause of loss, and that covered cause of loss results in damage. *Id.* In this case, Plaintiffs contend the tank car rupture itself is a covered cause of loss. *Id.*

As an initial matter, it is undisputed that the maintenance vendors had performed certain weld repair work on the tank car prior to the tank car rupture, and it is undisputed that Plaintiffs allege that the work they performed was negligent[2]. *See* Pl's Mem., p. 1; *see also* Def's Resp., p. 2. It is also not in dispute that the August 27, 2016 holding of the tank car was its first loading since returning from the custody of the maintenance vendors. *See* Pl's Mem., p. 6; *see also* Defs' Mot., p. 3. Plaintiffs acknowledge that Axiall has sued the maintenance vendors both in

[2] The Court considers it has also been proffered that an NTSB Report found that a preexisting crack of unknown origin caused the tank car rupture, not the faulty workmanship of the maintenance vendors, which the NTSB considered to be, at most, a contributing factor. *See* Pl's Reply, p. 3; *see also* Def's Resp., p. 2-5.

this Court and in the Court of Common Pleas of Allegheny County, Pennsylvania for, *inter alia*, negligence related to the tank car rupture. *See* Pl's Mem., p. 1.

With regard to Section 3.D, the Court examines the Policy language, including the last sentence, "This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]".

A federal court applying Georgia law to a faulty workmanship exclusion with an "ensuing loss" provision, such policy provisions are "routine in the industry" and are:

> applied in a situation where an excluded cause of loss, e.g., an earthquake, may both independently cause damage and result in a fire, an occurrence that is a covered cause of loss. In that situation the direct earthquake damage would not be insured but the ensuing fire damage would be insured.

Mock v. Central Mut. Ins. Co., 158 F. Supp. 3d 1332, 1341 (S.D. Ga. 2016) (internal punctuation and citation omitted).

In this case, even if it was the maintenance vendors' allegedly negligent maintenance or repair work which caused a defective condition in the tank car wall by weakening it and making it more susceptible to stress[3], Section 3.D would bar Plaintiffs from recovering for this defective condition, the cost that Plaintiffs would have incurred to remedy the negligent repair work and render the tank car safe for continued use, but would not bar Plaintiffs from recovering in the subsequently resulting additional covered loss. *See* Pl's Mem., p. 12-13. This subsequently resulting additional covered loss was the tank car's sudden rupture after it was loaded at the Natrium Plant with 90 tons of liquid chlorine, and the consequent escape of that chlorine into the Natrium Plant where it combined with water to form acids that caused damage to equipment and property at the Natrium Plant. *Id.* at 13. The Policies do not expressly exclude Tank Car

[3] Again, the Court notes it was proffered that an NTSB Report found that a preexisting crack of unknown origin caused the tank car rupture, not the faulty workmanship of the maintenance vendors, which the NTSB considered to be, at most, a contributing factor. *See* Pl's Reply, p. 3.

ruptures or releases of liquids or chemicals or chemical attacks of acid upon metal equipment. Therefore, those causes of loss are covered.

The Policies are "All Risk" first-party property policies, and each contains an "Insuring Agreement" that provides as follows:

> Subject to the terms, conditions and exclusions herein contained, this Policy insures, within the limits of liability set forth herein, the property and interest as hereinafter3 set forth and defined against All Risks of Direct physical loss or damage occurring anywhere during the period of this Policy and including whilst in transit by any means within the territorial limits herein, except as hereinafter excluded.

See Pls' Mem., p. 4.

As is clear from this language – and as the Insurers' witnesses have confirmed – the Policies provide broad coverage for all risks, except for those risks, or "perils" that are expressly excluded. *Id.* Plaintiffs have proffered that multiple Defendant Insurer witnesses have admitted that tank car ruptures and liquid spills are not excluded perils – or causes of loss. *Id.* at 13.

The Court considers that Plaintiffs' loss did not just consist of allegedly faulty workmanship on a tank car. *Id.* at 14. Rather, the allegedly faulty workmanship, combined with the filling of the tank car more than two months later with 90 tons of cold liquid chlorine resulted in the tank car's sudden rupture. *Id.* The rupture then caused the 90 tons of liquefied chlorine to spill out. *Id.* When it came in contact with the air, Plaintiffs proffered this resulted in vaporization of the chlorine, which formed a cloud or plume, which traveled through the Natrium Plant, then elsewhere. *Id.* The chlorine plume damaged equipment at the Natrium Plant. *Id.*

Because the tank car rupture/chlorine release is not an excluded peril from the Policies, and because the tank car rupture/chlorine release is therefore a covered peril that ensued, or resulted, from any alleged faulty workmanship on the part of the maintenance vendors, the Court finds Section 3.D of the Policies preserves coverage for all the damages these covered perils

caused. The Court finds Section 3.D does not bar coverage for Plaintiff's loss as a matter of law. Therefore, the Court finds that Plaintiffs' motion for partial summary judgment must be granted. The Court further hereby grants Plaintiffs' request for a declaration that Section 3.D of the Policies applies to Plaintiffs' claim for coverage, such that the faulty workmanship exclusionary language does not preclude coverage for Plaintiffs' claim.

Further, the Court also grants Plaintiffs' request that the Court dismiss the Defendants' affirmative defense that cites the "faulty workmanship" exclusion, 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' "Faulty Workmanship" Exclusion Defense is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Defendants' "faulty workmanship" exclusion, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, is hereby STRICKEN.

It is further hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion 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

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Joseph M. Rucki, Clerk
By _____ Deputy