

In the Circuit Court of Marshall County, West Virginia

**Westlake Chemical Corporation,
AXIALL CORPORATION,**
Plaintiffs,

v.

Case No. CC-25-2019-C-59
Judge Christopher C. Wilkes

**Great Lakes Insurance SE,
Navigators Management Co, Inc,
General Security Indemnity Co,
Validus Specialty Underwriting,
XL Insurance America, Inc. ET AL,**
Defendants

ORDER DENYING DEFENDANTS' MOTION FOR SETOFF

This matter came before the Court this 10th day of December, 2024, upon Defendants' Motion for Setoff. The Defendants, by counsel, have filed Defendants' Motion Setoff. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, Jessica L. G. Moran, 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 Westlake 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.; see *also* Defs' Mot., p. 1, Pl's Resp., p. 1. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts.

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. See Defs' Mot., p. 1; see *also* Pl's Prop. Ord. The Policies are all-risk, first-party property insurance policies.

3. There also exists a civil action referred to by the parties as "the Pennsylvania action" or "the Pennsylvania matter", which is Axiall Corporation v. AllTranstek, LLC, et al., Civil Division No. GD-18-010944, in the Court of Common Pleas of Allegheny County Pennsylvania. See Ord., 3/3/22; see also Defs' Mot., p. 2. The Court notes the Pennsylvania action was filed before the instant civil action. On October 14, 2021, the jury in the Pennsylvania action reached a verdict, and the verdict slip in that action directed the jury to state amount Axiall suffered in damages to the Natrium plant and equipment. *Id.* The jury rendered the following verdict:

Damage to Natrium plant and equipment:	<u>\$5,900,000.00.</u>
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On March 3, 2022, this Court entered an Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible, determining collateral estoppel applies to the related Pennsylvania action's verdict. See Defs' Mot., p. 2-3; see *also* Ord., 3/3/22, p. 13. The Court has determined in its Order Granting Defendants' Motion for Partial

Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Deductible that as a matter of law, Plaintiffs' claim for damage to the Natrium plant and equipment has been determined to be \$5.9 million, prior to the application of the appropriate \$3.75 million deductible. See Ord., 3/3/22; see *also* Defs' Mot., p. 2-3. The Court notes the jury verdict in the Pennsylvania action and the corresponding judgment were affirmed by the Superior Court of Pennsylvania on June 3, 2024. See Defs' Mot., p. 3; see *also* Defs' Mot., Ex. B.

4. On or about September 3, 2024, Defendants filed the instant motion, arguing the Court should apply a setoff to any judgment entered in this civil action to prevent Plaintiffs from receiving a double recovery, and further, in the event that the judgment in the Pennsylvania action is not satisfied until after a judgment is entered and satisfied in this civil action, Defendants argue this Court should order Plaintiff to disgorge or pay the money back to Defendants once the Pennsylvania action is satisfied. See Defs' Mot., p. 3.

5. On or about October 2, 2024, Plaintiffs filed Defendants' Brief in Opposition to Defendants' Motion Setoff, arguing the motion should be denied because the request for a setoff by virtue of an uncollected judgment that Plaintiff has obtained against a third party is remedy that is not authorized in the Policies or under applicable law. See Pls' Resp., p. 1. Specifically, Plaintiffs argue Defendants are attempting to circumvent the standard subrogation mechanism that contractually binds the parties under the terms of the Policies. *Id.* at 1-2.

6. On or about October 22, 2024, Defendants filed their Reply, arguing the Court has the inherent authority to set off one judgment against another. See Reply, p. 1. Further, Defendants argue they have not requested to invoke their subrogation rights under the Policies, and Plaintiffs did not support their theory that subrogation is the

exclusive remedy for Defendants to seek a setoff from the judgment in the Pennsylvania action on the same damages. See Reply, p. 2.

7. The Court finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

Defendants agree when the existing judgment (or any portion thereof) in the Pennsylvania action is satisfied, Defendants should be entitled to a setoff, thereby reducing the amount (if any) entered in the instant civil action. See Defs' Mot., p. 4, 5. In the alternative, Defendants argue that in the event the judgment (or any portion thereof) in the Pennsylvania action is satisfied after a judgment is entered and satisfied in this matter, Plaintiffs should be required to disgorge or pay back the amount paid by Defendants once the Pennsylvania action judgment is satisfied. *Id.*

On the other hand, Plaintiffs argue setoff cannot apply here because Defendants have not established any mutuality of obligation, as required under Georgia law. See Pls' Resp., p. 2. Further, Plaintiffs argue the proper means for any recovery for Defendants would be through the subrogation process as set forth in the Policies, which require as a prerequisite that the Defendants, after providing coverage for Plaintiffs' loss to request that Plaintiffs assign its claims against third parties to Defendants and pay a proportionate amount of the expenses associated with any recovery against those third parties. *Id.* at 2-3. Finally, Plaintiffs argue that the Defendants seek a contingent order granting them rights that may or may not arise in the future, because Defendants' demand did not exist at the time this action was initiated and is contingent upon Plaintiffs' recovery from third parties in the Pennsylvania action. *Id.* at 3.

As an initial matter, this Court notes that it is undisputed by the parties that pursuant to the Policies' choice-of-law provision, Georgia law applies to this dispute. See Defs' Mot., p. 3; see also Pl's Resp., p. 4.

“Georgia, as part of the common law and public policy, has always prohibited a plaintiff from a double recovery of damages; the plaintiff is entitled to only one recovery and satisfaction of damages, because such recovery and satisfaction is deemed to make the plaintiff whole.” *Candler Hosp., Inc. v. Dent*, 491 S.E.2d 868, 869 (Ga. Ct. App. 1997). Under Georgia law, set-off is a counter-demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic or independent of the plaintiff’s cause of action. *Automated Print, Inc. v. Edgar*, 6543 S.E.2d 413, 416 (Ga. Ct. App. 2007).

“However, this type of set-off does not operate as a denial of the plaintiff’s claim; rather, it merely allows the defendant to set-off a debt owed him by the plaintiff against the claim of the plaintiff.” *Stewart v. Stewart*, 511 S.E.2d 919, 920 (Ga. Ct. App. 1999).

“Between the parties themselves, any mutual demands existing at the time of the commencement of the suit may be set off.” Ga. Code § 13-7-5. Thus, in order for setoff to apply, “the claims must be between the same parties and in each of those party’s own right” and “any of such mutual demands [must be] existing at the time of the commencement of the suit[.]” *In re Palmieri*, 31 B.R. 111, 112 (N.D. Ga. Bankr. 1983) (applying Georgia law).

The Court considers the relevant statutes under Georgia code. As an initial matter, Title 13 governs contracts and Chapter 7 governs setoff and recoupment. Ga. Code §13-7-1 to Ga. Code §13-7-14.

First, Georgia Code §13-7-1 states that a set-off “allows the defendant to set off a debt owed him by the plaintiff against the claim of the plaintiff.” Ga. Code § 13–7–1.

Second, Georgia Code §13-7-5 governs “what may be set off”. “Between the parties themselves, any mutual demands existing at the time of the commencement of the suit may be set off.” Ga. Code §13-7-5. Further, Georgia Code §13-7-4 governs “mutual debts”. Georgia Code §13-7-4 states that” “Setoff must be between the same parties

and in their own right.” Ga. Code §13-7-4.

Further, Title 9 governs civil practice, and Chapter 13 governs executions and judicial sales. Ga. Code §9-13-1 to Ga. Code §9-13-178. Within Chapter 13, Article 4 governs satisfaction or discharge of judgment and execution. Ga. Code §9-13-70 to Ga. Code §9-13-80. Under Article 4, Georgia Code §9-13-75 governs setoff of judgments, rights of assignees, and states: “[o]ne judgment may be set off against another, on motion, whether in the hands of an original party or an assignee”. Ga. Code § 9-13-75.

The Court also examines the relevant language of the Policies. The Policies are “All Risk” first-party property insurance policies that each contain 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 hereinafter set forth and defined against All Risks of Direct physical loss or damage occurring anywhere during the period of this Policy...except as hereinafter excluded.

3. The Policies contain the following “Subrogation and Loan” provision:

If, in the event of loss or damage, the Insured shall acquire any right of action against any individual, firm or corporation for loss of, or damage to, property covered hereunder, the Insured will, if requested by the Company, assign or transfer such claim or right or action to the Company ... and will subrogate the Company to ... and will permit suit to be brought in the Insured’s name under the direction of and at the expense of the Company.

4. The Policies further provide:

... should the opportunity exist for recovery from a third party for loss suffered by the Assured, the Assured may elect to retain control of any legal action against said third party for its own interests and those to which this company may be subrogated as a result of loss payment made under this Policy. Further, the Assured’s interest shall not be limited by the coverage provided under this Policy and the expenses and benefits, if any, of such recovery action shall be shared by the Assured and this company in the proportion that their individual interests bear to their combined interests. Should

the Assured elect not to regain control of such a recovery action, the expenses and benefits of any legal action undertaken by this company shall be shared in the proportion that the individual interests of the Assured and [] this company in a claim hereunder bear to the total claim hereunder.

Here, there is no mutual counter demand for damages between Defendants and Plaintiffs in this action. See *Bank of Ozarks v. DKK Dev. Co.*, 726 S.E.2d 608, 612 (Ga. Ct. App. 2012) (“[m]utuality of obligation ... is required for a valid set-off.”). Here, Defendants seek to set off amounts they owe Plaintiffs based on amounts that may be recoverable from the defendants in the Pennsylvania action, who are not parties to this action. Therefore, this request is not as to “the parties themselves”, as specified by the plain language of the one-sentence-long Georgia Code §13-7-5. Likewise, Georgia Code §13-7-4 specifies that “[s]etoff must be between the same parties...”. Ga. Code §13-7-4. For these reasons, after examining Georgia law, the Court finds subrogation to be the more appropriate mechanism for the relief Defendants seek.

The Court agrees under black letter law, a double recovery would not be permitted. However, here, the Policies contain subrogation provisions that govern situations like these where a covered loss may be recoverable from a third party.

Georgia law recognizes that “a subrogee ‘stands in the shoes’ of the insured and can pursue any cause of action assigned to it.” *Ga. Cas. & Sur. Co. v. Woodcraft by MacDonald, Inc.*, 726 S.E.2d 793, 797 (Ga. Ct. App. 2012), *aff’d*, 743 S.E.2d 373 (Ga. 2013). When an insurer “stands in the shoes” of the insured, it is “placed in the same position as the [insured] which includes the disabilities as well as the rights.” *Travelers Ins. Co. v. Commercial Union Ins. Co.*, 335 S.E.2d 681, 684 (Ga. Ct. App. 1985).

The Court concludes it shall deny the request for setoff, but Defendants are entitled to subrogate Plaintiffs’ rights against the tortfeasors in the amount of negligence that the Pennsylvania jury determined. Specifically, the jury in the Pennsylvania action

determined the fault for the release was attributable to each of the Pennsylvania action defendants' negligence as follows: AllTranstek – 20%, Rescar 40%, and Axiall – 40%. Accordingly, this Court concludes that Defendants are entitled to pursue their subrogation rights under the Policies as to the Pennsylvania action's Judgment, and therefore, the request for setoff contained in this instant motion must be denied.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Motion for Setoff 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.

Enter: December 10, 2024

/s/ Christopher C. Wilkes
Circuit Court Judge
2nd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.