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 GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING COUNT I AND COUNT II AND FOR PRE-JUDGMENT INTEREST AND FINAL JUDGMENT ORDER

This matter came before the Court this 10th day of December, 2024. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation, by counsel, have filed Plaintiffs' Motion for Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-Judgment Interest. 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* Pls' Mem., p. 3; see also Defs' Resp., p. 2. 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 Pls' Mem., p. 2; see also Defs' Resp., p. 2. The Policies are all-risk, first-party property insurance policies. Id.

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' Resp., p. 12. 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: $5,900,000.00.

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* Pls' Mem., p. 6; *see also* Ord., 3/3/22, p. 13; *see also* Defs' Mem., p. 12. 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' Mem., p. 12.

4. On or about September 3, 2024, Plaintiffs filed the instant motion, seeking the Court enter judgment in its favor on Count I (Declaratory Judgment) and Count II (Breach of Contract) of Westlake's Complaint in this action, because Plaintiffs argue there is no dispute that each of the Insurers' issued all-risk property insurance policies to Westlake are valid and enforceable, the instant chlorine rupture is a covered cause of loss under the Policies, this covered loss caused $5.9 million in damage to property at Westlake's Natrium Plant, and there is no dispute that Defendant Insurers failed to pay Westlake anything. *See* Pls' Mem., p. 1-2. Further, Plaintiffs argue the Court should, in its discretion, award Westlake pre-judgment interest. *Id*. at 2.

5. On or about October 2, 2024, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for PartialSummary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) of Plaintiffs' Complaint and for Prejudgment Interest, arguing the motion should be denied and the Court should deny the request for prejudgment interest. *See* Defs' Resp., p. 2.

6. On or about October 25, 2024, Plaintiffs filed their Reply, arguing Defendants did not engage with the straightforward argument regarding the elements of breach of contract, because they cannot. See Reply, p. 2. Plaintiffs argue that Defendants, instead, threw a Hail Mary pass in its Response arguments, using their

Response as a de facto summary judgment motion of their own, arguments which are "pure nonsense". Id. at 2-3.

7. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment. 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

Plaintiffs argue this Court should enter judgment in its favor on Count I (Declaratory Judgment) and Count II (Breach of Contract) of Westlake's Complaint in this action, because Plaintiffs argue there is no dispute that each of the Insurers' issued all-risk property insurance policies to Westlake are valid and enforceable, the instant chlorine rupture is a covered cause of loss under the Policies, this covered loss caused $5.9 million in damage to property at Westlake's Natrium Plant, and there is no dispute that Defendant Insurers failed to pay Westlake anything. *See* Pls' Mem., p. 1-2. Further, Plaintiffs argue the Court should, in its discretion, award Westlake pre-judgment interest. *Id*. at 2.

Defendants, on the other hand, argue that they did not breach the Policies, because they did not pay the May 22, 20218 partial proof of loss, which Defendants argue only contained supported amounts incurred at the time at an amount that was below the deductible. *See* Defs' Resp., p. 13. Further, Defendants aver Plaintiffs failed to cooperate with the adjustment process by failing to produce the Exponent report/test results and pre-Incident photographs, and in doing so, failed to comply with conditions precedent to coverage. *Id*. at 14-15. Finally, Defendants argue they did not breach the Policy because of the disparity between the amount claimed and the ultimately determined damage amount. *Id*. at 17-18.

The Court notes it has been established and the parties agree that Georgia law governs the interpretation of the Policies. *See court file; see also* Pls' Mem., p. 7. The

elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken. *Norton v. Budget Rent A Car System, Inc.*, 307 Ga. App. 501, 502 (Ga. App. Ct. 2010); *see also Cox Enter., Inc. v. Hiscox Ins. Co., Inc.*, 478 F. Supp. 3d 1335, 1341 (N.D. Ga. 2020)(applying these elements to a breach of contract dispute involving an insurance contract and observing that "[i]n Georgia, ordinary rules of contract interpretation govern the interpretation of insurance policies.").

The Court analyzes the elements for breach of contract. As an initial matter, this Court finds that there is no dispute between the parties that the Policies are valid and enforceable contracts. *See* Pls' Mem., p. 8. Further, the Court examines whether the subject tank car rupture/chlorine release event is a covered cause of loss.

Under Georgia law, courts deploy a two-step analysis in assessing whether an insurer breached its obligations in failing to pay a claim under an all-risk policy: (1) the policyholder must show a fortuitous event; and (2) the burden then shifts to the insurers to show that the loss is excluded by some language in the policy. *Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.,* 639 Fed. App'x 599, 601 (11th Cir. 2016). A fortuitous loss "is an event which so far as the parties to a contract are aware, is dependent on chance." *Id*. Under Georgia law, showing that such a fortuitous event occurred is a "light burden". *Id.* Here, there appears to be no objection by Defendants that the subject chlorine release was a fortuitous event.

The Policies are all risk property policies, entitling Westlake to coverage for all risks of direct physical loss or damage except as contained in the exclusions. *See* Pls' Mem., p. 8. This Court has determined in its prior Orders that the rupture is a covered cause of loss. In November 2021, this Court entered orders on the "coverage" motions for summary judgment, which included briefing and summary judgment motions

regarding various exclusions. In this Court's November 2021 orders, this Court concluded that the chlorine release/tank car rupture is a covered peril, or covered cause of loss, under the Policies. *See* Order on "Corrosion" Exclusion, p. 7; Order on "Faulty Workmanship" Exclusion; p. 9, Order on "Contamination" Exclusion, p. 8. The Court notes that at this time, the Court held that the Asbestos Exclusion was proper, but that the corrosion, faulty workmanship, and contamination exclusions did not apply as a matter of law. *See* Defs' Mem., p. 7; *see also* Pls' Mem., p. 9. Further, the Court notes that Plaintiffs aver that regarding the asbestos exclusion, there was no disputed issue of material fact that Plaintiffs' claim did not seek coverage for any asbestos-related damage subject to the exclusion. *See* Prop. Ord., p. 3. Therefore, the Court concludes the rupture was a covered cause of loss, to which no coverage-defeating exclusions applied.

Finally, the Court addresses the final element, damages. It is not in dispute that Defendants have not paid Plaintiffs for the damages resulting from the rupture. *See* Pls' Mem., p. 8, 9. The Court notes that as explained above, that the damages in this civil action have been determined as a matter of law. Because a valid and enforceable contract exists, the Defendants never paid Plaintiffs under their Policies on account of the rupture, and because the rupture is a covered cause of loss to which no exclusions applied, that resulted in damages to Plaintiffs, all the elements of for breach of contract (Count II) under Georgia law have been established. Accordingly, Plaintiffs are entitled to summary judgment on Count II. Because Plaintiffs' Count I (Declaratory Judgment) seeks a declaration as to the Insurer's contractual obligations under the terms of the Policies, the Court concludes a finding in Plaintiffs' favor on Count II necessarily compels a finding in Plaintiffs' favor on Count I.

The Court addresses Defendants' Response arguments as they relate to the elements of breach of contract under Georgia law. The Court does not find Defendants'

Response arguments persuasive. The pre-incident photographs and exponent reports, as discussed in this Court's bad faith order, do not change the fact that as of the date of the Pennsylvania verdict (as discussed more fully below), the damages and coverage in this civil action were determined[1]. Those items do not change the fact that the incident is a covered loss under the Policies. *See* Reply, p. 4. The Court finds any overarching argument that Plaintiffs failed to cooperate and therefore forfeited coverage under the Policies is unsupported and untimely. *Id*. at 5. This argument was not pled in the Defendants' Affirmative Defenses and was not brought in either the "coverage" round or "non-coverage" round of summary judgment motions before this Court in 2021. *Id*. at 6. As recently as this Court's status hearing in June 2024, when breach of contract was being discussed, counsel for Defendants stated, "I don't know how we would try the case or argue against a breach of contract since we don't have those exclusions anymore." *Id*. at 7 (citing Tr., Ex. 1 at 16:6-17:6). Accordingly, the Court finds these arguments untimely and unpersuasive, and finds they are contradicted by the facts and law regarding breach of contract in Georgia.

The Court next turns to the issue of pre-judgment interest. Under Georgia law, in contract cases, the non-breaching party, may at the court's discretion, be entitled to recover pre-judgment interest from the time of the breach until recovery. Ga. Code §13-6-13.

The Court, in its discretion, finds that an award of pre-judgment interest is appropriate here. The damages have been determined as a matter of law, and Defendants have continued to hold onto the money owed to Westlake. An award of pre-judgment interest will compensate Westlake for being deprived of the use of that money for a significant amount of time.

The Court next analyzes the time that constitutes "from the time of the breach until

recovery". Ga. Code §13-6-13. Plaintiffs argue the Court should award pre-judgment interest from June 21, 2018, thirty days after Westlake submitted its first partial proof of loss, which it claims Defendants refused to pay. *See* Pls' Mem., p. 10.

After consideration, this Court determines that time of the breach is the time of the Pennsylvania verdict, at which time, a factual determination of the jury was made as to the amount of damages. At that time, the actual value was found as a matter of law. At this time, the amount was known, and the Defendants did not pay it. The Court notes no evidence was submitted to the Court that Defendants ever made a tender offer after the amount of damages was determined by the jury.

Therefore, this Court exercises its discretion under Georgia Code §13-6-13 to award Plaintiffs pre-judgment interest from August 10, 2022, the date that the damages were determined and known to Defendants through the date of the entry of this Order. The Court notes in a related action, Marshall County Civil Action No. 18-C-202 and 203, this Court considered the Praecipe for Entry of Judgment and Notice of Entry of Judgment, which filed in the Pennsylvania action on August 10, 2022, entering judgment in that action, and in that case determined this Praecipe for Entry of Judgment and Notice of Entry of Judgment determined "final judgment" in the Pennsylvania action. *See* Ord., 8/29/22, 18-C-202 & 203, ¶¶28-29. The Court further notes that in this case, Plaintiffs also agree August 10, 2022 was the date of the Judgment in the Pennsylvania action, as is stated in their proposed order on Defendants' Motion for Setoff. *See* Prop. Ord. Denying Mot. For Setoff, p. 3 ("A Judgment on the verdict was entered on August 10, 2022."). Accordingly, this Court awards pre-judgment interest from August 10, 2022 through the date of the entry of this Order.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion for

Partial Summary Judgment Regarding Count I (Declaratory Judgment) and Count II (Breach of Contract) and for Pre-Judgment Interest is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that:

1. Summary Judgment is granted in favor of Plaintiffs and against Defendants as to Count I (Declaratory Judgment) and Count II (Breach of Contract);
2. Plaintiffs are awarded breach of contract monetary damages in the amount of $2,150,000.00 (calculated as the $5,900,000.00 property damage amount adopted by this Court's collateral estoppel ruling, minus the applicable deductible of $3,750,000.00);
3. Plaintiffs are awarded pre-judgment interest on $2,150,000.00, at the relevant statutory rate, commencing on August 10, 2022, the date the Pennsylvania Court entered its judgment, reflecting the verdict and damages, through the date of the entry of this Order; and
4. Plaintiffs are awarded post-judgment interest at the relevant statutory rate.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. This is a FINAL ORDER. There being nothing further to accomplish in this matter, the Clerk is directed to retire this matter from the active docket.

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

[1] Likewise, Defendants' argument regarding the disparity between Plaintiffs' claimed amount in its March 20, 2019 Proof of Loss and the ultimate determination of damages at $2.15 million ($5.9 million minus the deductible), does not change the fact that the damages amount and coverage in this civil action were determined and Defendants did not then tender payment.

/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.