

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUN COMPANY, INC.	:	CIVIL ACTION
and	:	
SUN COMPANY, INC. (R&M),	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
BROWN & ROOT BRAUN, INC.	:	
and	:	
BROWN & ROOT, INC.	:	
Defendants	:	
and Third Party	:	
Plaintiffs,	:	NO. 98-6504
	:	
v.	:	
	:	
MECHANICAL CONSTRUCTION, INC.,	:	
and DIAMOND STATE	:	
INSURANCE CO.,	:	
	:	
Third Party	:	
Defendants.	:	

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SUN COMPANY, INC.	:	CIVIL ACTION
and	:	
SUN COMPANY, INC. (R&M),	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
HIGHLANDS INSURANCE COMPANY	:	
Defendant.	:	NO. 98-5817

**M E M O R A N D U M**

Newcomer, S.J.

December , 2000

Currently pending before the Court are cross motions for summary judgment submitted by third party plaintiffs Brown & Root Braun, Inc. and Brown & Root, Inc., and by third party

defendants Diamond State Insurance.

**I. BACKGROUND**

On September 9, 1992, plaintiff Sun Company, Inc. ("Sun") entered into a contract with defendant Brown & Root ("B&R"), who was to act as general contractor for work to be performed at Sun's refinery in Marcus Hook, on a project known as the BeNeshaps Project. Mechanical Construction, Inc. ("MCI") was engaged by B&R as a subcontractor on the project.

On March 21, 1994, MCI employees were engaged in "hot work" activities on top of a sludge storage tank when the tank exploded, injuring numerous MCI employees and subcontractors. The ensuing investigation by OSHA resulted in numerous citations against all parties responsible for work on the tank—Sun, B&R, and MCI.

Twelve of the injured workers filed suit in the Court of Common Pleas. The cases were ultimately consolidated under the caption Richardson et al. V. Sun Co Inc. Et al., Phila. CCP, December 1995, No. 2962. With the help of Judge Mark I. Bernstein and a Mediator, the twelve cases were settled in 1998 for \$13,028,350.

The settlements were paid from a pool of funds required by the Court and Mediator. MCI contributed nearly \$6,000,000 to the fund, per the terms of MCI's subcontract. B&R's primary insurance carrier, Highlands Insurance Co. ("Highlands"),

contributed \$738,337.52 of it's \$1 million dollar limit towards the settlement fund. Riunione Adriatica Di Sicurta ("Riunione"), B&R's excess insurer, did not contribute any of it's \$4 million dollar policy limit, nor did B&R contribute to the fund. The remaining \$6,629,128 was contributed by Sun, with all parties reserving their rights to resolve the responsibility and coverage issues to a later date and a different forum. The dispute presently before the Court is the latest installment of the parties' efforts to resolve their responsibilities.

B&R filed a Third-Party Complaint against Diamond State Insurance Co., MCI's primary insurer, alleging breach of contract and bad faith on January 18, 2000. More specifically, plaintiffs allege that defendant failed to defend and indemnify B&R in the underlying litigation described above. Indeed, on March 10, 1995 Stephanie D. Jackson, counsel for B&R, sent a letter to MCI demanding that MCI's insurers defend and indemnify B&R in the underlying litigation.

On April 13, 2000, Diamond State filed its answer to B&R's Complaint which contained crossclaims and counterclaims against Third Party Defendant Highlands. Those claims alleged a breach of contract and bad faith claim against Highlands based upon Highlands failure to defend and indemnify Sun and MCI in the underlying litigation described above, and that because of Highlands' failure, Diamond State incurred defense and

indemnification costs that Highlands should have shouldered.

The substantive issue the parties focus upon in their respective briefs is whether the Diamond State policy issued to MCI and the Highlands policy issued to B&R are "at the same level," or whether the Diamond State policy must be implicated before the Highlands policy. (See Brown & Root Defendants' Memorandum Brief in Further Support of Their Crossmotion for Summary Judgment, at 3). Accordingly, the substantive aspect of the parties' cross motions for summary judgment are based upon various contractual provisions. However, today's decision deals exclusively with the statute of limitations issues the parties also raise. Thus, the contractual provisions will not be summarized here because they are not relevant to the Court's opinion today.

The Court now turns to a discussion of the parties' motions with respect to the statute of limitations issues.

## **II. DISCUSSION**

### **A. Legal Standard**

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. See Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Common, 826 F. Supp. 1506 (E.D. Pa. 1993). Summary judgment is appropriate "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." FED.R.CIV.P. 56(c) (1994). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324.

A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992).

Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3rd Cir. 1992).

**B. Statute of Limitations**

First, the Court confronts Diamond State's argument that B&R's breach of contract and bad faith claims are both barred by the applicable statute of limitations. In Pennsylvania, a party asserting a claim for breach of contract must commence an action against the breaching party within four years of the date of the breach. See 42 PA. CONS. STAT. § 5525 (West 2000). Generally, a cause of action accrues when "a party has a legal right to institute suit and can maintain a successful action." ITG, Inc. v. Price Waterhouse, 697 F. Supp. 867, 870-71 (E.D.Pa. 1988) (citing Kapil v. Association of Pennsylvania State College and University Faculties, 470 A.2d 482 (1983)). Additionally, when parties have an agreement to do a particular thing, a right of action is complete as soon as there is a failure to perform. See Selig v. Philadelphia Title Ins. Co., 111 A.2d 147, 151 (Pa. 1955).

With respect to B&R's breach of contract claim, Diamond State argues that B&R's claim arose when Diamond State failed to defend B&R, shortly after B&R demanded a defense from Diamond State on March 14, 1995. In Trustees of the International Brotherhood of Electrical Workers Local 98 Pension Plan v. Aetna Casualty & Surety Company, the Court held that the insured's 1997 claim for breach of contract based upon a failure to defend theory arose when the defendant insurer failed to appoint

competent counsel to defend the insured. See Trustees of the International Brotherhood of Electrical Workers Local 98 Pension Plan v. Aetna Casualty & Surety Company, No. 97-7407, 1999 WL 116285 at \*2-4 (E.D.Pa. March 5, 1999).

In that case, the defendants had a contractual obligation to defend plaintiff and appoint counsel for that defense pursuant to an insurance agreement between the parties. See id. at \*1. The United States Department of Labor sued the plaintiffs in underlying litigation, and defendant first failed to defend plaintiffs in that action in 1987, and then when it did defend plaintiffs in 1988, failed to appoint competent counsel. See id. The Court concluded that the plaintiffs claim was time barred by Pennsylvania's four year statute of limitations for breach of contract because plaintiffs "clearly knew over four years before initiating suit that [defendant] had breached its obligation to provide a meaningful defense." See id. at \*4.

Here, when Diamond State failed to respond in any way to B&R's March 14, 1995 demand that MCI's insurer tender B&R a defense, it was apparent to B&R that it would not be provided a defense. Moreover, the March 14, 1995 letter even stated that B&R "look[ed] forward to [MCI's] prompt reply." Thus, shortly after March 14, 1995, when MCI failed to arrange for its insurer to defend B&R, it was clear that MCI's "prompt reply" was not forthcoming, and B&R could have sued MCI and/or Diamond State for

a failure to defend.

B&R argues that its cause of action for breach of contract did not arise until April or May 1996 when it first incurred defense costs in the underlying litigation. However, B&R fails to cite any legal authority for that proposition, and fails to offer any reason or analysis why the Court should adopt that proposition. Because B&R knew Diamond State would not tender B&R a defense shortly after March 14, 1995, the Court finds that its cause of action for breach of contract arose then. Accordingly, the Court finds that B&R's cause of action for breach of contract arose shortly after March 14, 1995, and B&R's breach of contract claim was time barred when B&R filed its Complaint on January 18, 2000.

In addition to its breach of contract claim, B&R claims that Diamond State acted in bad faith when it failed to defend B&R. Diamond State argues that B&R's bad faith claim is barred under a two year statute of limitations applicable to bad faith claims. B&R asserts that its bad faith claim is permissible because the Pennsylvania "catch all" six year statute of limitations, see 42 PA. CONS. STAT Pa. § 5527(6) (West 2000) applies to bad faith claims.

An insurer's bad faith conduct requires a dishonest purpose and means a breach of a known duty where self-interest motivates the breach; mere negligence or bad judgment is not bad

faith. See Polseli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994). Because the Pennsylvania Supreme Court has yet to articulate the precise statute of limitations applicable to bad faith claims, federal district courts have applied either a two year "tort" statute of limitations, or a six year "catch all" statute of limitations. See Nelson v. State Farm Mut. Auto. Ins. Co., 988 F. Supp. 527, 530 (E.D.Pa. 1997) (Dalzell, J.). The courts' approaches differ because some courts conclude bad faith sounds in tort, while others conclude that bad faith sounds in both tort and contract, and that in such a case, the catch all statute should apply. See id.

However, based upon the history of "bad faith" as a cause of action, the nature of a bad faith cause of action, and the approaches taken by the heavy majority of other state supreme courts, federal district courts have recently applied the two year tort statute of limitations. See, e.g., Nelson, 988 F. Supp. at 534; McCarthy v. Scottsdale Ins. Co., C.A. 99-978, 1999 WL 672642, \*3 (E.D.Pa., Aug 16, 1999) (comparing the tort approach employed by the Nelson Court and the catch all approach and concluding that tort approach is appropriate); Mantakounis v. Aetna Casualty & Surety Co., C.A. No. 98-4392, 1999 WL 600535 (E.D.Pa., Aug 10, 1999); Friel v. Unum Life Ins. Co. of Amer., C.A. No. 97-1062 (E.D.Pa. Nov. 17, 1998). Upon review of those cases, and especially Nelson's presentation of the reasons

supporting the two year statute of limitations for bad faith claims, this Court is persuaded that a two year statute of limitation is proper for bad faith claims.

B&R argues that both its contract and bad faith claims were subject to a tolling of the statute of limitations during a state court action between these parties from March 19, 1998 until March 21, 2000, and until Diamond State filed its cross actions in this case on April 13, 2000. However, because the Court adopts a two year statute of limitations for B&R's bad faith claims, the statute ran a short time after March 14, 1997. Furthermore, there is no evidence that B&R presented either its bad faith or breach of contract claims to the Philadelphia Court of Common Pleas in 1998. Indeed, B&R's Answer to Diamond State's Complaint in that action reveals that B&R did not assert breach of contract or bad faith claims.

Next, the Court finds B&R's claim that Diamond State waived its statute of limitations defense in a March 21, 2000 stipulation dismissing this action from the state court without merit. In that stipulation, only B&R waived the statute of limitations as a defense, and even then, only waived it for the period of time from the filing of the stipulation in state court until "the joinder of the claims of Plaintiffs set forth in the Complaint in the Federal Court Actions." (See March 21, 2000 stipulation). Consequently, B&R's contract and bad faith claims

were time barred when B&R filed its complaint on January 18, 2000, and the Court will dismiss those claims.<sup>1</sup>

While the Court concludes B&R's claims are time barred, the Court's statute of limitations analysis cannot end here. In what may result in bitter irony for Diamond State, the Court now turns to whether Diamond State's counterclaims against Highlands are similarly time barred.

In its April 13, 2000 Answer, Diamond State asserts as a counterclaim against B&R and Highlands all of the claims it asserted in the March 1998 Philadelphia Court of Common Pleas lawsuit. Those claims were for: 1) breach of contract; 2) promissory estoppel; 3) unjust enrichment; 4) declaratory judgment; and 4) bad faith. In this Court, Diamond State and B&R agreed to resolve their dispute on summary judgment, and upon a review of Diamond State's summary judgment briefs, it appears Diamond State now pursues only its breach of contract and bad faith claims.

As Diamond State furiously argued in its summary judgment briefs, and as this Court has found today, a breach of

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<sup>1</sup>B&R also contends that when Diamond State settled the underlying claims on behalf of some insureds, but not B&R, that action constituted an independent act of bad faith occurring within a two year statute of limitations. However, that contention is unpersuasive because even though Diamond State may have made the settlements with its other insureds in May 1998, the fact remains that B&R's bad faith claims accrued shortly after March 14, 1995.

contract claim is subject to a four year statute of limitations, while bad faith claims are subject to a two year statute of limitations. B&R claims in its Brief in Further Support of its Cross Motion for Summary Judgment that within weeks of the March 21, 1994 explosion, Diamond State demanded that B&R fulfill its contractual obligations and help defend Sun and the other parties Diamond State ultimately defended alone. If that is true, it appears Diamond State's counterclaims against B&R are barred by the relevant statutes of limitation.<sup>2</sup> However, the Court cannot conclude that Diamond State's counterclaims are time barred without some evidence that Diamond State made a demand upon B&R within weeks of the March 21, 1994 explosion.

Because the Court finds that Diamond State may no longer have the right to pursue its breach of contract and bad faith claims, the Court shall Order additional briefing on that issue alone. That briefing shall be filed in accordance with the Order accompanying this opinion.

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Clarence C. Newcomer, S.J.

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<sup>2</sup>Oddly, or perhaps tellingly, Diamond State did not respond to B&R's argument that if B&R's claims are time barred then Diamond State's claims are likewise time barred. That Diamond State responded to each of B&R's other arguments pertaining to the statute of limitations issues is equally revealing.

