

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

CROWN, CORK & SEAL COMPANY, : CIVIL ACTION
INC. :
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 v. :
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 EMPLOYERS INSURANCE OF WAUSAU : NO. 99-4904

MEMORANDUM ORDER

This case arises from a March 1985 settlement agreement (the "Agreement") between plaintiff and its insurers, including defendant, regarding each insurer's primary and excess coverage of plaintiff's asbestos claim liabilities. The Agreement sets up a two-tiered structure for disbursement of funds to plaintiff, under which each insurer compensates plaintiff for settlement or judgment costs ("indemnity costs") and defense and other administrative costs. After each primary insurer's contributions has reached a certain level (the "aggregate limit"), that insurer is discharged from further responsibility. Each of plaintiff's excess liability insurers then contribute funds for similar costs until its aggregate limit is met. Defendant is both a primary and excess liability insurer of plaintiff.

The Agreement also names a third-party administrator (the "Administrator") to process and maintain records of the asbestos claims. It further provides that the insurers would pay a pro rata share of a specific per file service fee to the Administrator in return for these processing tasks. The original service fee was \$75.

The Agreement contains a Pennsylvania choice of law provision. The Agreement contains an integration clause and provides that no amendment or modification will be effective unless set forth in writing. In a subsequent written amendment to the Agreement in October 1986 (the "First Amendment"), the parties named plaintiff as the Administrator and provided for a service fee of \$95 which could be renegotiated after two years. In a written amendment in October 1988 (the "Second Amendment"), the parties increased the service fee to \$104.50 for the following two years with a right thereafter to renegotiate the fee "to provide for such adjustment as may be required to reflect the increases in the Consumer Price Index."

In October 1996, defendant notified plaintiff by letter that it had obtained a bid of \$40.00 per file from an outside party to perform the Administrator duties and asked that plaintiff renegotiate its service fee. Plaintiff did not respond. On December 1, 1996, defendant notified plaintiff by letter that it would consider plaintiff to be in breach of the Agreement because plaintiff had not replied to the earlier letter. Defendant further stated that thereafter it would reimburse plaintiff according to a \$40 service fee and did so for several billing statements beginning December 1, 1996.

Plaintiff and defendant then engaged in negotiations about the service fee in December 1997, but did not agree on a

new fee. In February 1998, defendant began to reimburse plaintiff with its share of a \$60 fee, rather than \$104.50.

Plaintiff has asserted claims against defendant for breach of contract for its failure to pay its pro rata share of the \$104.50 service fee and for defendant's inclusion of service fees paid in its calculation of its total contribution towards its aggregate limit. In a counterclaim, defendant seeks a declaration that it satisfied the full \$20 million aggregate limit of excess insurance coverage required under the Agreement because it has paid that amount in defense and indemnity costs and service fees, that it had a right to reduce the service fee and that it has complied with its obligations under the Agreement and the Amendments. Effectively, the counterclaim simply asserts an affirmative defense that defendant has not breached the contract.

Presently before the court is plaintiff's Motion for Judgment on the Pleadings on defendant's counterclaim.

Defendant suggests that plaintiff's motion is really one for summary judgment because whether service fees count against the aggregate limit can be resolved only by resort to extrinsic evidence and because the counterclaim regarding the fee reduction is predicated on a course of dealing which defendant presumes can be shown only with evidence beyond the pleadings. Defendant suggests that both parties be allowed to muster and

present additional evidence. The short answer is that if judgment requires resort to matters beyond the pleadings, the motion will be denied. Plaintiff has characterized its motion as one for judgment on the pleadings and has based it solely on the pleadings and appended contract. The court will treat the motion as styled.

A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is governed by the same standard as a motion to dismiss under Rule 12(b)(6). See Turbe v. Gov't. of the Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1999). The court thus views the factual allegations in the pleadings and the inferences reasonably drawn therefrom in a light most favorable to the non-movant, and grants the motion only if it is clear from those allegations and inferences that the non-movant can prove no set of facts in support of his claim which would entitle him to relief. See Jablonski v. Pan American World Airways, 863 F.2d 289 290-91 (3d Cir. 1988). The court may also consider a document explicitly relied upon in or appended to the pleadings without converting the motion to one for summary judgment. See Shaw v. Digital Equipment Corp., 82 F.3d 1194, 1220 (3d Cir. 1996); Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993).

Like other agreements, settlement agreements are construed according to general contract principles. See New York

State Electric & Gas Corp. v. FERC, 875 F.2d 43, 45 (3d Cir. 1989). A court examines a contract to ascertain the intent of the parties as manifested by the language of their written agreement. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995); Bethlehem Steel Corp. v. MATX, Inc., 703 A.2d 39, 42 (Pa. Super. 1997). When the express language of the agreement is clear and unambiguous, the parties' intent is determined only from the writing. See Pacitti v. Macy's, 193 F.3d 766, 773 (3d Cir. 1999); Sunbeam Corp. v. Liberty Mutual Ins. Co., 740 A.2d 1179, 1184 (Pa. Super. 1999). In determining whether an ambiguity exists, however, the court may consider alternative meanings suggested by the parties and any supporting objective indicia, as well as the context in which the agreement was made. Id.; Hullett v. Towers, Perrin, Forster & Corsby, Inc., 38 F.3d 107 111 (3d Cir. 1994).

If a contract is ambiguous, that is reasonably susceptible of alternative interpretations, then interpretation of the contract must be left to the factfinder in view of extrinsic evidence. Stendardo v. Federal Nat'l. Mortgage Ass'n., 991 F.2d 1089, 1094 (3d Cir. 1993); Hutchison v. Sunbeam Coal Corp. 519 A.2d 385, 390 (Pa. 1986). A contract may be ambiguous if it is silent or indefinite on a pertinent matter. See Carpenter Technology Corp. v. Armeo, Inc., 800 F. Supp. 215, 219 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993); Edward E.

Goldberg & Sons, Inc. v. Jersey Central Power & Light Co., 1990 WL 764476, *2 (E.D. Pa. June 6, 1990). A contract term is not ambiguous, however, merely because the parties disagree about the proper interpretation. See Samuel Rappoport Family Partnership v. Meridian Bank, 657 A.2d 17, 21-22 (Pa. Super. 1995).

When a contract is unambiguous, the court construes and enforces it in accord with its clear terms. See Allegheny Int'l. v. Allegheny Ludburn Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994); Mellon Bank, N.A. v. Aetna business Credit, Inc., 619 F.2d 1001, 1011 n. 10 (3d Cir. 1980).

The Agreement is silent on the question of whether service fees count toward exhaustion of the aggregate limits. That the Agreement is also silent regarding treatment of future indemnity costs, which both parties agree may exhaust the aggregate limits, does not make the matter of service fees any less indefinite. It is a matter which can be resolved only by resort to pertinent extrinsic evidence.

The language of the Second Amendment, however, is clear regarding the amount of the service fee and the possibility of an upward adjustment "to reflect increases in the Consumer Price Index." Defendant suggests that the prospect of a downward adjustment is inherent in the duty of good faith and fair dealing of parties to a contract. While the duty of good faith and fair dealing can be an interpretive tool to determine the parties'

justifiable expectations, it cannot be used to override an express contractual term. See Duquesne Light, 66 F.3d at 617; USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 439 (3d Cir. 1993).

Defendant also contends that plaintiff's willingness to negotiate in December 1997 about a reduced fee is tantamount to an acknowledgment by plaintiff that the Agreement contemplated a downward adjustment. It is not. The most which can reasonably be said is that this shows both parties recognized virtually any contract term may be modified by negotiation resulting in mutual assent. See Empire Properties, Inc. v. Equireal, Inc., 674 A.2d 297, 302-03 (Pa. Super. 1996) (consideration implied from mutual assent of parties to contract modification).

A party to a contract, of course, may not disregard or alter a material term simply because the other party has consented to negotiate about a proposed change. There is no suggestion that the negotiations in question regarding the service fee ever culminated in a written modification. Nevertheless, it is not clear from the face of the pleadings and appended documents that there was no modification.

A written contract may be modified by subsequent agreement through words or conduct of the parties. See Cedrone v. Unity Sav. Ass'n., 609 F. Supp. 250, 254 (E.D. Pa. 1985); Dora v. Dora, 141 A.2d 587, 590-91 (Pa. 1958). A written contract may

be so modified even where there is a provision expressly prohibiting non-written modifications, although such a modification must be proved by clear and convincing evidence. See First Nat. Bank of Pa. v. Lincoln Nat. Life Ins. Co., 824 F.2d 177, 180 (3d Cir. 1987); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968); Empire Properties, 674 A.2d at 303-04. Depending upon all of the surrounding facts, plaintiff's acceptance without protest of the lesser sum for more than a year under the circumstances may support a finding of a modification. See, e.g., Bonczek v. Pascoe Equipment Co., 450 A.2d 75, 78 (Pa. Super. 1982).

ACCORDINGLY, this day of January, 2001, upon consideration of plaintiff's Motion for Judgment on the Pleadings (Doc. #8) and defendant's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.