

**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.	:	

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. January , 2001

Now pending before the Court is what remains of third party defendants Diamond State Insurance Co.'s ("Diamond State") Motion for Summary Judgment and third party plaintiffs Brown &

Root Braun, Inc. and Brown & Root, Inc.'s ("B&R") Motion for Judgment as a Matter of Law after this Court's December 8, 2000 opinion in the above captioned case. That opinion found that B&R's claims against Diamond State were barred by the relevant statutes of limitation. That opinion further questioned whether Diamond State's claims for breach of contract and bad faith against Highlands Insurance Company ("Highlands") were likewise time barred, and the Order accompanying that opinion required the parties to submit additional briefs directed to that issue. Consequently, the Court will decide today whether Diamond State's claims are time barred, and if they are not, will decide whether Diamond State may recover on its claims against Highlands.

I. BACKGROUND

At this late stage in the litigation, the parties are intimately familiar with this case, and the Court will not recount how this case originally arose.¹ However, because the Court finds that Diamond State's breach of contract claim is not time barred, the Court will recite certain relevant facts.

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

¹Further, the Court explained the origin of this case in its December 8, 2000 opinion.

upon Highlands failure to defend and indemnify Sun Company Inc. ("Sun") and Mechanical Construction Inc. ("MCI") in the underlying litigation described in the December 8, 2000 opinion, and that because of Highlands' failure, Diamond State incurred defense and indemnification costs that Highlands should have shouldered.

As this Court further stated in its December 8, 2000 opinion, to determine whether Diamond State may recover on its breach of contract claim, the Court must decide 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. If the Diamond State policy must be implicated before the Highlands policy, Diamond State cannot recover on its breach of contract claim.

With the issue framed, the Court now recites the relevant contractual provisions that give rise to Diamond State's claim and B&R's opposition to that claim.

A. The Contract Between B&R and Sun

B&R and Sun entered into a contract (the "General Contract") which outlined B&R's liability to Sun for the Marcus Hook project, and B&R's duty to insure Sun:

Section 6.1 - Liability Indemnity

Contractor [B&R] agrees to defend and indemnify Owner [Sun], its parent, subsidiaries and

affiliates, as well as the employees and agents of Owner, its officers, invitees, partners and their respective partners, parents, parent-affiliated companies, assignees, and successors in interest, from and against any and all claims, liabilities, expenses (including reasonable attorney's fees), losses, damages, demands, fines and causes of actions for property damage...and personal injury to the extent caused by or arising out of the negligent acts or omissions of Contractor, its subcontractors, agents, servants or employees, whether or not such actions omissions occurred jointly or concurrently with the negligence of the Owner, its parent, subsidiaries or affiliates or other third parties...

Section 7.2 - Comprehensive Bodily Injury and Property Damage Liability Insurance

...Such insurance shall, subject to policy terms and conditions and only to the extent necessary to provide coverage under Contractor's insurance for the liability assumed by Contractor under Article VI Indemnification:...(b) be primary to any insurance Owner has in effect...

Based upon the General Contract, Diamond State argues that the Highlands' policy is subordinated to any insurance available to Sun. Because Highlands' policy is subordinated, Diamond State further argues Highlands, and not Diamond State, should have defended Sun.

B. The Subcontract Between B&R and MCI.

B&R in turn entered into a contract (the "subcontract") with MCI which outlined MCI's liability to B&R for the Marcus Hook project, and MCI's duty to provide insurance to B&R.

Section 5

Subcontractor [MCI] agrees to defend and indemnify General Contractor [B&R] and Owner [Sun]...from

and against any and all claims, liabilities, expenses (including reasonable attorney's fees), losses damages, demands, fines and causes of action caused by or arising out of [MCI's] or its lower tier subcontractor's actual or alleged acts or omissions of the actual or alleged acts or omissions of [MCI's] or its lower tier subcontractor's agents, servants or employees...

Section 5.2.1 - 5.2.4

5.2.1 Without in any way limiting [MCI's] liability hereunder [MCI] shall maintain the following insurance in form and with underwriters satisfactory to [B&R].

5.2.1.3 Comprehensive or Commercial General Liability (Bodily Injury and Property Damage)...The limit of the liability for such insurance shall not be less than \$1,000,000 per occurrence for Bodily Injury and \$1,000,000 per occurrence for Property Damage.²

5.2.2 The above insurances shall be on an occurrence basis and shall include a requirement that the insurer provide General Contractor with 30 days' written notice prior to the effective date of any cancellation or material change of the insurance....The insurance specified in 5.2.1.2, 5.2.1.3, 5.2.1.4, and 5.2.1.5 above shall:...

(ii) provide that said insurance is primary coverage with respect to Subcontractor's operations hereunder.

5.2.3 The liability insurance coverages furnished by Subcontractor pursuant to 5.2.1 shall name the General Contractor, the Owner, the General Contractor's other subcontractors, and all of their affiliates as Additional Insureds...

5.2.4 General Contractor shall, or shall have others name Subcontractor as an Additional Insured on liability insurance policies in the amounts and

²This clause was later amended to say "the limit of liability for such insurance shall not be less than \$5,000,000.

with coverage equivalent to liability insurances required of Subcontractor in 5.2.1 insuring Subcontractor and its lower-tier subcontractors and their respective affiliates...

Additionally, section 5 of the subcontract was amended by an attachment as follows:

Subcontractor agrees to defend and indemnify General Contractor and Owner, their parent, subsidiaries and affiliates, as well as the employees and agents of General Contractor and Owner, their officers, invitees, partners and their respective partners, parents, parents-affiliated companies, assigns and successors in interest...to the extent caused by or arising out of the negligent acts or omissions of Subcontractor, its subcontractors, agents, servants or employees, whether or not such actions or omissions occur jointly or concurrently with the negligence of the General Contractor and/or Owner...

Based upon the subcontract, B&R claims that the subcontract unambiguously made Diamond State's policy the first implicated because Diamond State's policy is "primary coverage with respect to [MCI's] operations".

C. The Diamond State Insurance Policy Issued to MCI.

Diamond State insured MCI pursuant to an insurance policy effective from July 1, 1993 until July 1, 1994 (the "Diamond State policy"). When discussing additional insureds, that policy contained the following provision:

16. It is understood and agreed that where required by contract, bid or work order, Additional Insureds and/or Waiver of Rights of Subrogation are automatically included hereunder, but only with respect to acts or omissions of Named Assured [MCI] in connection with Named Assured Operations,

subject to further to Notice Clauses and/or Primary Insurance Clauses as may be required by written contract only.

With respect to the availability of other insurance for any potential insured, the Diamond State Policy provides as follows:

6. Other Insurance: The Insurance afforded by this policy is primary Insurance, except when stated to apply in excess of or contingent upon the absence of other Insurance. When this Insurance is primary and the Assured has other Insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Underwriter's liability under this policy shall not be reduced by the existence of such other Insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the Underwriter shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contributions below:

- a) Contribution by Equal Shares: If all such other valid and collectible Insurance provides Contribution by Equal Shares, the Underwriter shall not be liable for a greater proportion of such loss than would be payable if each Assurer contributes an equal share until the share of each Assurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining Assurers then continue to contribute equal shares of the remaining amount of the loss until each Assurer has paid its limits in full or the full amount of the loss is paid.
- b) Contribution by Limits: If any such other insurance does not provide for Contribution by Equal Shares, the

Underwriter shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limits of all valid and collectible insurance against such loss.

Based upon the Diamond State policy, Diamond State claims that additional insureds were only afforded coverage "to the extent of the acts or omissions" of MCI, the named insured. Thus, it argues that if additional insureds B&R and/or Sun negligently caused the Marcus Hook explosion, then Highlands and not Diamond State had the duty to defend B&R and/or Sun. It reasons that Diamond State only had an obligation under the policy to defend and indemnify Sun and/or B&R for their vicarious liability arising out of MCI's acts or omissions.

D. The Highlands Insurance Policy Issued to B&R.

As explained above, Highlands insured B&R pursuant to an insurance policy (the "Highlands policy") effective from January 1, 1994 until January 1, 1995. With respect to other insurance, the Highlands policy provides:

4. Other Insurance
If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
 - a. Primary Insurance
This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or in any other basis:

- (1) This is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
- (2) This is Fire Insurance for premises rented to you; or
- (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A....

c. Method of Sharing

If all other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

Additionally, the Highland's policy contained the following endorsement which became effective on January 1, 1994.

A. Additional Insured Endorsement

In the event that a contract executed by an authorized corporate officer of a named insured provides that another party to the contract shall be named as an additional insured on liability insurances of the named insured, subject to the coverages and limits provided in the policy such other parties shall be considered an additional insured on this policy without further action but only with the coverages and the minimum amounts of insurances required to be carried by the named insured under the contract and only for the

liabilities the named insured assumes under the contract. Except as provided above, a party may be named as an additional insured on this policy only by endorsement hereto. The duty to defend an additional insured shall be limited to that portion of defense costs which is directly attributable to the defense of an insured claim.

In light of the foregoing contractual provisions, the Court now turns to a discussion of Diamond State's Motion for Summary Judgment.

II. DISCUSSION

A. Legal Standard

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

Before the Court discusses the merits of Diamond State's Motion for Summary Judgment, the Court will first resolve the statute of limitations issues. Diamond State demanded that B&R fulfill its contractual obligations and help defend Sun and the other parties Diamond State ultimately defended alone within two weeks of the March 21, 1994 explosion. However, Diamond State contends that its breach of contract claim is not barred by the four year statute of limitations applicable to such claims³ because Diamond State filed a Writ of Summons in the Court of

³Diamond State agrees, and this Court found in its December 8, 2000 opinion, that a four year statute of limitations applies to breach of contract actions in Pennsylvania.

Common Pleas on March 19, 1998,⁴ and served that Writ upon B&R the next day. Additionally, in the March 21, 2000 stipulation the parties filed in the Court of Common Pleas, B&R waived the statute of limitations as a defense 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).

The law in Pennsylvania is clear that a writ of summons properly issued within the applicable statute of limitations validly commences an action. See PA.R.Civ.P. § 1007; Katz v. Greig, 339 A.2d 115, 117 (Pa. Super. Ct. 1975). Here, Diamond State's breach of contract claim is not time barred because it filed and served its Writ of Summons within the four year statute of limitations, and when the parties dismissed the state court action, B&R agreed to waive the statute of limitations as a defense until Diamond State's state court claims were joined in this case.

While the statute of limitations does not bar Diamond State's breach of contract claims, Diamond State's bad faith claims are time barred. As Diamond State argued in its effort to

⁴As the Court explained in its December 8, 2000 Opinion, Diamond State filed an action in the Philadelphia Court of Common Pleas in 1998 asserting claims against B&R that are similar to the ones Diamond State alleges now. However, the action was voluntarily dismissed by stipulation of the parties on March 21, 2000.

dismiss B&R's claims, and as the Court held in its December 8, 2000 opinion, a two year statute of limitations applies to bad faith claims. Because Diamond State filed and served its Writ of Summons nearly four years after it first demanded coverage from B&R, its bad faith claims were not made within two years and are time barred.⁵ Accordingly, Diamond State's only remaining claim in this action is for breach of contract.

C. Diamond State's Breach of Contract Claim

Diamond State's breach of contract claim against Highlands is based upon Highlands' failure to defend the parties Diamond State defended in the underlying litigation described in the December 8, 2000 opinion, and that because of Highlands' failure, Diamond State incurred defense and indemnification costs that Highlands should have shouldered.

B&R maintains that the subcontract unambiguously subordinated Diamond State's policy to any other insurance policies available to Sun, MCI and B&R. It is well settled that when interpreting a contract, the Pennsylvania courts look to the words of the agreement to determine the parties' intent. See, e.g., Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982). To make this determination, the court looks to what the parties have

⁵Diamond State concedes this point because it failed to address the bad faith statute of limitations issue in its Supplemental Brief filed in accordance with this Court's December 8, 2000 opinion and accompanying Order. Consequently, there is no question that its bad faith claims are time barred.

clearly expressed, as the law does not assume that the language of the contract was chosen carelessly. See Meeting House Lane, Ltd. v. Melso, 628 A.2d 854, 857 (Pa. Super. Ct. 1993).

Furthermore, when defining the objective intent of the parties, a court must examine the entire agreement because a writing is interpreted as a whole. See Atlantic Richfield Co. v. Razumic, 390 A.2d 736, 739 (Pa. 1978); see also Williams v. Metzler, 132 F.3d 937, 947 (3rd Cir. 1997).

Only where the writing is ambiguous may a fact finder examine all the relevant extrinsic evidence to determine the parties' mutual intent. See Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3rd Cir. 1994).

Therefore, as a preliminary matter, courts must "'determin[e] as a matter of law which category written contract terms fall into—clear or ambiguous.'" Id. (citation omitted). Because Pennsylvania law presumes that the writing conveys the parties' intent, a contract is ambiguous "if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered

ambiguous by the mere fact that the parties do not agree on the proper construction." Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3rd Cir. 1995) (citing Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 22 (Pa. Super. Ct. 1995)).

Whether the subcontract required Diamond State's policy to be implicated before any of B&R's insurance depends upon the Court's interpretation of section 5.2.2(ii) of the subcontract which provides that MCI's insurance: "...is primary coverage with respect to Subcontractor's operations hereunder." According to B&R, Diamond State's policy was properly implicated before Highlands' policy because it was "primary," and because of the contractual scheme between Sun, B&R and MCI. Diamond State counters by asserting that the quoted language above does not subordinate Diamond State's policy to any other policy, but rather provides that the insurance coverage MCI procures to insure itself would be primary insurance coverage. Diamond State further suggests that at the very least, the subcontract is ambiguous and should be construed against B&R as B&R drafted the agreement.

The Court finds that the subcontract is clear, and that B&R's interpretation of the subcontract is the only logical one, especially in light of section 5.1. of the subcontract. Without a doubt, section 5.1 of the subcontract requires MCI to defend

and indemnify B&R and Sun. Thus, read in context, Diamond State's interpretation of section 5.2.2(ii) makes little sense; B&R had no interest in ensuring that the insurance coverage MCI procured to insure itself would be primary insurance coverage. B&R's interest in requiring MCI to carry insurance was to ensure that MCI provided coverage to B&R, and coverage to Sun so that B&R would not have to insure Sun pursuant to the General Contract. Accordingly, based upon the entire subcontract, the intended effect of section 5.2.2(ii) was to subordinate MCI's insurance to B&R and Sun's insurance.⁶

However, in litigation involving this very case, this Court previously concluded that a contract between an insured and the additional insured, where the insurance company is not a party, cannot expand the duties of the insurance company. See Sun Co. Inc. v. Brown & Root Braun, Inc., NO. CIV. A. 98-6504, CIV. A. 98-5817, 1999 WL 681694 (E.D.Pa. Sep 02, 1999); see also Transport. Indem. Co. v. Home Indem. Co., 535 F.2d 232, 238 (3rd Cir. 1976). Consequently, while the subcontract may define the intended subordinated status of MCI's insurer, that subcontract cannot expand the duties of Diamond State under the policy

⁶The Court's conclusion here further addresses Diamond State's argument that the General Contract subordinated Highlands' policy to any insurance available to Sun. Diamond State's argument ignores the order in which insurance is implicated pursuant to the subcontract, and is therefore unpersuasive.

Diamond State provided to MCI because Diamond State was not a party to the subcontract.

Under provision 16 of the Diamond State policy, Diamond State insured Sun and B&R, "but only with respect to acts or omissions of Named Assured [MCI] in connection with Named Assured Operations "to the extent of the acts or omissions" of MCI, the named insured. Based upon provision 16, Diamond State argues it only had an obligation under that policy to defend and indemnify Sun and/or B&R for their vicarious liability arising out of MCI's acts or omissions.

In Harbor Insurance Company v. Lewis, the United States District Court for the Western District of Pennsylvania construed an insurance policy similar to the one at bar. See Harbor Insurance Company v. Lewis, 562 F. Supp. 800 (W.D.Pa. 1983). In that case, the City of Philadelphia claimed that it was an "additional insured" pursuant to an insurance policy issued by Harbor Insurance Co. to Reading Co. The endorsement in that case stated:

It is agreed that the insurance afforded by this policy shall apply to the following additional insureds but only to the extent of liability resulting from occurrences arising out of negligence of Reading Company and/or its wholly owned subsidiaries:

City of Philadelphia

Id. at 802. Based upon the foregoing language, the Court ruled that the City of Philadelphia was only afforded coverage to the

extent the City was vicariously liable for the conduct of Reading. See id. at 805. The Court reasoned that the endorsement was not intended to encompass the active negligence of the City of Philadelphia that may have been concurrent with that of Reading, the named insured. See id.

In this case, provision 16 is even clearer than the endorsement in Harbor Insurance Company. Provision 16 specifically limits coverage to an additional insured only with respect to the acts or omissions of MCI. Thus, provision 16, by its plain and unambiguous terms, only affords coverage to B&R and/or Sun for the vicarious liability that they may have had for MCI's acts or omissions causing the Marcus Hook Refinery explosion.

Because the subcontract does not modify the Diamond State policy, the Diamond State policy was not available to B&R or Sun except for their vicarious liability for MCI's acts or omissions. While the subcontract may have obligated MCI to provide Sun and B&R an unqualified defense, Diamond State was not a party to that contract, and was not bound by it.

However, despite this conclusion, the Court must further consider the effect of the General Contract upon Diamond State's breach of contract claim. Earlier, in this same litigation, the Court decided that under the General Contract, B&R was only "required to obtain insurance coverage to the extent

necessary to satisfy the indemnity it assumed in Section 6.1 of the Contract, which has already been determined to be for B&R's proportionate share of negligence. Sun Co. Inc. v. Brown & Root Braun, Inc., NO. CIV. A. 98-6504, CIV. A. 98-5817, 1999 WL 681694 (E.D.Pa. Sep 02, 1999) (construing the General Contract at issue in this case). In that opinion, this Court concluded that B&R was not obligated to defend or indemnify Sun for Sun's own negligence. In light of the Court's previous holding in this case, Highlands, B&R's insurer, had no obligation to provide Sun a defense for Sun's own negligence. Thus, Highlands has no obligation to indemnify Diamond State for the money Diamond State paid Sun for Sun's own negligence.⁷

Therefore, the Court will deny Diamond State's Motion for Summary Judgment and dismiss this action.

An appropriate Order will follow.

Clarence C. Newcomer, S.J.

⁷While Highlands had an obligation to indemnify Diamond State for any contribution Diamond State made to B&R's defense for B&R's own negligence, it does not appear that Diamond State tendered such a defense to B&R. Should that not be the case, the Court will of course entertain an appropriate motion for reconsideration.