

I. BACKGROUND

General Refractories Company ("GRC"), a producer of asbestos containing refractories, is a defendant in numerous asbestos lawsuits throughout the country. Between December 1975 and December 1976, Federal Insurance Company ("Federal") issued GRC an excess liability policy.¹ In June of 2000, GRC informed Federal and its other insurer, American Reinsurance ("Am Re"), that all insurance underlying their policies had been exhausted. One month later, GRC requested that Federal and Am Re pay for the indemnity and related costs, including defense costs, for the claims covered by the policies. While Federal agreed to pay the indemnity portion for GRC's claims, it has refused to pay for any costs related to the defense.

On October 30, 2000, GRC instituted the instant action alleging in Count I of its Complaint that Federal breached a contractual duty to pay GRC's costs, including defense costs, under the excess liability policy.² Federal now moves this Court for summary judgment on Count I of GRC's Complaint, alleging that the

¹ Federal characterizes the policy at issue as a "second layer excess liability policy." See Def.'s Mot. for Partial Summ. J. at 2. GRC refutes this characterization. According to GRC's complaint, the \$5 million Federal policy is written along with a policy issue by American Reinsurance Company ("Am Re") as part of \$10 million layer coverage. See Pl.'s Resp. to Def.'s Mot. for Partial Summ. J at 2. "What this means is that Federal and Am Re each pay 50% of each claim dollar, up to a total of \$10 million (or \$5 million each)." Id. Plaintiff asserts that Am Re has paid its proportionate share of costs incurred in defending the asbestos claims. Id.

² GRC also named Marsh and McLennan Company as a defendant to the instant action, but Marsh and McLennan is not a party to the current motion.

policy unambiguously imposes no obligation on Federal to pay GRC's defense costs.

II. 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). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (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. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). 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. Id. "To grant [a] party summary judgment on an issue of contract interpretation, a court must conclude that the disputed provision is subject only to one reasonable interpretation." EarthData Int'l of N.C. v. STV, Inc., 159 F.Supp.2d 844, 845 (E.D. Pa. 2001) (citing Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 163-64 (3d Cir. 2001)).

III. DISCUSSION

The instant dispute arises from the parties' different interpretations of Paragraph 7 of the Insuring Agreement, entitled "Defense." Paragraph 7 provides:

The Company shall not be called upon to assume charge of the investigation, settlement or defense of any claim made, or suits brought, or proceedings instituted against the Insured, but shall have the right and be given the opportunity to be associated in the defense and trial of any such claims, suits or proceedings relative to any occurrence which, in the opinion of the Company, may create liability on the part of the Company under the terms of this policy. If the Company avails itself of such right and opportunity, the

Company shall do so at its own expense. Court costs and interest, if incurred with the consent of the Company, shall be borne by the Company and other interested parties in the proportion that each party's share of LOSS bears to the total amount of LOSS sustained by all interested parties.

See Def.'s Mot. for Partial Summ. J. Ex. A, Insuring Agreement, at ¶ 7 (emphasis added) (hereinafter "Insuring Agreement" or "Agreement").

Federal contends that the Agreement unambiguously imposes no obligation on Federal to defend actions brought against GRC or to pay GRC's defense costs. See id. at 9. The term "court costs and interests," Federal asserts, does not include attorney's fees or other costs charged by defense counsel. Id. at 11. GRC concedes that the policy at issue gives Federal "the right to be associated in the defense and trial of any claims, but not the obligation to so do." Pl.'s Resp. to Def.' Mot. for Partial Summ. J. at 3. However, GRC contends that "[t]he obligation of Federal to pay 'court costs and interest' is separate and distinct from whether Federal avails itself of the opportunity to be associated in the claims, suits or proceedings . . ." Id. According to GRC, "court costs" was meant to "include all costs relating to court proceedings, not just taxed court costs." Id. at 8 (emphasis in

original).

A. Duty to Defend

Under Pennsylvania law,³ the duty to defend is a distinct obligation separate and apart from the duty to indemnify. Jacobs Constr., Inc. v. NPS Energy Servs., 264 F.3d 365, 376 (3d Cir. 2001); Jerry Davis, Inc. v. Maryland Ins. Co., 38 F.Supp.2d 387, 389 n.3 (E.D. Pa. 1999); Britamco Underwriters v. Weiner, 636 A.2d 649, 651 (Pa. Super. Ct. 1994). "The duty to defend arises whenever claims asserted by the injured party potentially come within the coverage of the policy." Jerry Davis, 38 F.Supp.2d at 389 n.3. The duty to indemnify, however, arises only when the insured is determined to be liable for damages within the coverage of the policy. Jacobs Constr., 264 F.3d at 376; Jerry Davis, 38 F.Supp.2d at 389 n.3.

In the instant case, it is evident that Federal has not availed itself of a duty to defend. As the Insuring Agreement makes clear, "[t]he Company shall not be called upon to assume charge of the investigation, settlement or defense of any claim made, or suits brought, or proceedings instituted against the Insured . . ." Insuring Agreement, at ¶ 7. The Court, however,

³ The present matter is before the Court based on the Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). The parties have relied principally on Pennsylvania law in their pleadings, and neither party disputes the applicability of Pennsylvania law to the contract at issue. Sitting in diversity, the Court must apply state law to the substantive questions raised by this dispute. See Erie R.R. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938). Accordingly, the Court will analyze the parties' arguments under Pennsylvania law.

agrees with GRC that, as the plain language of the contract makes clear, Federal's duty to defend is separate from its duty to indemnify. The provision of the Agreement excluding Federal's obligation to investigate and defend claims against GRC does not necessarily exempt Federal of the obligation to pay certain costs. Therefore, the issue is whether the term "court costs," as it appears in the relevant policy provision, is sufficiently ambiguous to thwart the imposition of summary judgment.

B. Rules Of Contract Interpretation

Under Pennsylvania law, the Court must determine, as a matter of law, whether the relevant contract terms are ambiguous. 12th St. Gym v. Gen. Star Indem. Co., 93 F.3d 1158, 1165 (3d Cir. 1996); Polish Am. Mach. Corp. v. R.D.&D Corp., 760 F.2d 507, 512 (3d Cir. 1985); Mellon Bank, N.A. v. Aetna Bus. Credit, 619 F.2d 1001, 1010 (3d Cir. 1980). If the contract is unambiguous, then it is for the Court to decide whether the contract was breached. St. Paul Fire & Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 (3d Cir. 1991); Mellon Bank, 619 F.2d at 1011 n.10; Engers v. Perini Corp., Civ. A. No. 92-1982, 1993 WL 235911, at *3 (E.D. Pa. June 28, 1993). On the other hand, if an ambiguity is found, then it is for the trier of fact to determine the meaning of the contractual terms by considering both the plain language and extrinsic evidence. Mellon Bank, 619 F.2d at 1011 & n.10.

In order to determine whether ambiguity exists, the terms

in question must be considered in the context of the Agreement as a whole. Giancristoforo v. Mission Gas and Oil Prod., Inc., 776 F.Supp. 1037, 1041 (E.D. Pa. 1991). Under this axiom, if the apparent ambiguity of one provision in an insurance policy is resolved by another provision of the contract, no ambiguity exists. Gen. Accident Ins. Co. of Am. v. Safety Nat'l Cas. Corp., 825 F.Supp. 705, 708 (E.D. Pa. 1993). In general, policy terms should be construed to avoid ambiguities. Id. Moreover, a court cannot rewrite the terms of a policy or give them a construction in conflict with the accepted and plain meaning of the language of the policy. Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc., 858 F.2d 128, 131 (3d Cir. 1988) (footnote omitted).

A contract is ambiguous if it is reasonably susceptible to more than one interpretation. See McMillan v. State Mut. Life Assurance Co. of Am., 922 F.2d 1073, 1075 (3d Cir. 1990); Samuel Rappaport Family P'ship v. Meridian Bank, 657 A.2d 17, 21-22 (Pa. Super. Ct. 1995). Since courts must construe ambiguous provisions against the insurer, reasonable interpretations of ambiguous provisions in insurance policies that are offered by the insured control. McMillan, 922 F.2d at 1075. Conversely, when a provision of an insurance policy is clear and unambiguous, a court is required to give effect to that language. See Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 564, 566 (Pa. 1983).

C. Duty to Pay Defense Costs

Both parties have offered varied interpretations of the "court costs and interest" language in the Insuring Agreement. According to Federal, "[n]either the right to associate in GRC's defense, nor the agreement to pay a proportionate share of consented-to court costs and interest, creates an obligation to pay defense expenses." Def.'s Mot. for Partial Summ. J. at 9. Under Federal's interpretation of the Agreement, the payment obligation arises only with respect to "court costs and interests"; that is, costs charged by courts, and not fees and costs charged by defense counsel. Id. at 11. Moreover, Federal only agreed to pay a proportionate share of court costs if such costs were incurred with Federal's consent. See id. at 19. GRC, however, contends that the relevant terms of the policy are sufficiently ambiguous to defeat summary judgment. See Pl.'s Resp. to Def. Mot. for Partial Summ. J. at 6. According to GRC, "'[c]ourt costs' was meant to include all costs relating to court proceedings - as with the Am Re Policy - and not just taxed court costs." Id. at 8.

It is clear that GRC and Federal disagree over the meaning of "court costs" as it is used in the Agreement. However, the parties' mere ability to advance differing interpretations is not sufficient to show that the contractual language is ambiguous. See Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 94-95 (3d Cir. 2001); see also EarthData Int'l of N.C. v. STV,

Inc., 159 F.Supp.2d 844, 846-47 (E.D. Pa. 2001). Rather, the parties interpretations must be reasonable, and, as the Third Circuit has recently made clear, "the proffered interpretation cannot contradict the common understanding of the disputed term or phrase when there is another term that the parties could easily have used to convey this contradictory meaning." Bohler-Uddeholm, 247 F.3d at 94-95.

Federal's reading of the term "court costs" is reasonable. Generally, the term "court costs" encompasses those expenses incurred by a party which have been taxed as costs by the court. Items that courts have held may be awarded as costs include: docket fees, jury fees, photocopy costs, deposition costs, and the like. See e.g., Kojeszewski v. Brigantine Castle and Amusement Corp., 449 A.2d 28, 29 (Pa. Super. Ct. 1982); Madrid Motor Corp. v. Cashan, 213 A.2d 284, 287 (Pa. Super. Ct. 1965). It is true, as GRC contends, that Federal's failed to define the term "court costs and interests" in the Agreement. However, the Pennsylvania Supreme Court recently reiterated that the absence of a policy definition does not render a term ambiguous. See Madison Constr. Co. v. Harleysville Mutual Ins. Co., 735 A.2d 100, 108 (Pa. 1999).

While the Court finds that Federal has set forth a reasonable interpretation of the Agreement, under Pennsylvania law, the Court's analysis of an allegedly ambiguous insurance policy

does not end with this determination. Little v. MGIC Indem. Corp., 836 F.2d 789, 794 (3d Cir. 1987). Rather, the Court must consider "the interpretation offered by the insured." Id. "If this interpretation is also reasonable, the policy is ambiguous and must be construed against the insurer." Id.

At first glance, GRC's proffered interpretation of "court costs" seems to contradict the common understanding of the term. Generally, if both court costs and attorney's fees are to be awarded to or recoverable by a party, both terms are identified separately. See e.g., 42 Pa. Cons. Stat. Ann. § 8371 ("In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may (3) Assess court costs and attorney fees against the insurer."). However, the term "court costs" does not stand alone in the Agreement. Rather, the term is modified by an option clause. Paragraph seven limits Federal's reimbursement of "court costs and interest" to those "incurred with the consent of the Company." Insuring Agreement, at ¶ 7. GRC contends that the conditioning language in paragraph seven of the Agreement creates an ambiguity sufficient to withstand the imposition of summary judgment.

GRC's contention that the term "court costs and interest" may be read more broadly due to the option clause is reasonable. According to GRC, "[i]f the phrase 'court costs and interest' did

not include attorney's fees and other forms of defense costs, but rather was limited to costs taxed by the court and interest on any judgment awarded by the court, the phrase 'if occurred [sic] with the consent of the Company' would be rendered meaningless. Incurring such costs are not within the discretion of the insured, but rather are imposed a court." See Pl.'s Resp. to Def.' Mot. for Partial Summ. J. at 7. GRC further asserts that "the only discretionary costs an insured can incur, and with respect to which seek the company's consent, are attorney's fees and other types of defense costs." Id. Therefore, GRC is able to provide a "contractual hook" upon which to base their ambiguity argument beyond their expectations as a contracting party. Bohler-Uddeholm, 247 F.3d at 93 ("A parties expectations, standing alone, are irrelevant without any contractual hook on which to pin them.") (emphasis in original).

GRC asserts that if Federal in fact meant to include only taxed court costs in its policy, than Federal, like Am Re, could have used the term "taxed court costs." Pl.'s Resp. to Def.' Mot. for Partial Summ. J. at 7. The Am Re policy defines the term "costs" as "interest on judgments, investigation, adjustment and legal expenses including taxed court costs and premium on books." Id. The availability of a more specific term lends credence to GRC's contention that "court costs," as it appears in the Agreement, is ambiguous.

"To grant [a] party summary judgment on an issue of contract interpretation, a court must conclude that the disputed provision is subject only to one reasonable interpretation." EarthData Int'l of N.C. v. STV, Inc., 159 F.Supp.2d 844, 845 (E.D. Pa. 2001) (citing Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 163-64 (3d Cir. 2001)). The inclusion of the option clause after the term "court costs" is sufficient to create ambiguity arising from the language of the contract itself. It is reasonable to interpret the language of the Agreement to include certain costs over which Federal has the right to consent, rather than those automatically imposed by a court. Accordingly, there is a genuine issue of material fact that must be preserved for a jury. Therefore, Federal's Motion for Partial Summary Judgment as to Count I of GRC's Complaint is denied.

An appropriate Order follows.

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

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| GENERAL REFRACTORIES COMPANY | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| FEDERAL INSURANCE COMPANY, <u>et. al.</u> | : | NO. 00-5508 |

O R D E R

AND NOW, this 6th day of December, 2001, upon consideration of the Defendant Federal Insurance Company's Motion for Partial Summary Judgment (Docket No. 9) Plaintiff's Memorandum of Law in Opposition of Defendant's Motion for Partial Summary Judgment (Docket No. 10), Defendant's Reply Memorandum in Further Support of its Motion for Partial Summary Judgment (Docket No. 11), Plaintiff's Sur-Reply Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Docket No. 14), and Plaintiff's Supplemental Response to Federal Insurance Company's Motion for Partial Summary Judgment (Docket No. 18), Defendant's Reply to Plaintiff's Supplemental Response to Defendant's Motion for Partial Summary Judgment (Docket No. 19), and Plaintiff's Sur-Reply in Support of Its Supplemental Response to Defendant's Motion for Partial Summary Judgment (Docket No. 20), IT IS HEREBY ORDERED

that Defendant's Motion for Partial Summary Judgment as to Count I of Plaintiff's Complaint is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.