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

RLI INSURANCE CO.	:	CIVIL ACTION
	:	
v.	:	
	:	
BENNETT COMPOSITES, INC., et al.	:	NO. 04-272

MEMORANDUM

Baylson, J. **November 2, 2005**

I. Introduction

Plaintiff RLI Insurance Company ("RLI") filed this action, based on a surety bond, against Defendants Bennett Composites, Inc. ("BCI"), Gary L. Bennett, Kay Bennett, Charles H. Stephens ("Charles"), and Floy Stephens ("Floy") (or collectively, "Defendants") on January 22, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 due to the diversity of citizenship of the parties.

In a Memorandum and Order dated March 28, 2005, the Court denied Defendants' Motion to Dismiss. RLI Ins. Co. v. Bennett Composites, Inc., 2005 WL 724184 (E.D. Pa. 2005). The Court, in a July 14, 2005 Order, allowed for further discovery in the case, requiring that any additional dispositive motions be filed by August 26, 2005.

Presently before the Court therefore are: (1) Plaintiff's Motion for Partial Final Summary Judgment, and (2) Plaintiff's Supplemental Motion for Enforcement of Its Rights of Indemnity and for Partial Summary Judgment Against All Defendants.

II. Background

The Court's Memorandum and Order of March 28, 2005 describes the allegations in RLI's complaint in detail, but a brief summary of the procedural history of the case is instructive.

RLI had executed surety bonds with respect to the subcontract between BCI and Norwood Company ("Norwood") on a construction project known as the 2301 Renaissance Boulevard, King of Prussia, Upper Merion Township, Pennsylvania project (the "2301 project"). RLI asserts that the individual defendants in this case are indemnitors to RLI on the RLI surety bond. In October 2001, Norwood declared BCI in default on its subcontract, and Norwood subsequently filed suit against RLI in this court, Norwood Co. v. RLI Ins. Co., 01-CV-6153. At the same time, BCI brought a state court action in Alabama against Norwood, and the court subsequently ordered the dispute to arbitration. In January 2004, the arbitration panel entered an award in favor of Norwood and against BCI in the amount of $1,124,085.08. The arbitration award was subsequently confirmed by this court, Norwood Co. v. Bennett Composites, Inc., 2004 WL 1895193 (E.D. Pa. Aug. 24, 2005), and the parties then entered two days of mediation before Senior District Judge Lowell A. Reed, Jr. This mediation resulted in a settlement of Norwood's claims against RLI and BCI as to the 2301 project, and, under its terms, RLI agreed to pay Norwood $620,500. Defendant Gary Bennett later asserted that he had not agreed to the settlement reached in mediation, but this Court rejected those contentions in a Memorandum and Order enforcing the settlement agreement. Norwood Co. v. RLI Ins. Co., 2005 WL 273244 (E.D. Pa. Feb. 2, 2005).

In this case, RLI's original motion for partial summary judgment was filed on April 12, 2005. RLI included in its motion a statement of undisputed facts. Floy filed a Response in Opposition on April 26, 2005 and included a point-by-point response to RLI's statement of undisputed facts. Charles filed his Response in Opposition on May 6, 2005, but this document

included no direct response to the statement of undisputed facts provided in RLI's original brief.[1] No response was received from Gary or Kay Bennett. RLI then filed its Reply Brief on May 27, 2005.

Pursuant to a July 14 Order from this Court, Plaintiff's motion to compel discovery was granted, and a revised filing date for dispositive motions was set, effectively continuing Plaintiff's Motion for Partial Final Summary Judgment. On August 31, 2005, Plaintiff RLI filed its Supplemental Motion for Enforcement of Its Rights of Indemnity and for Partial Summary Judgment Against All Defendants ("Renewed Motion"). Charles filed his Response to the Supplemental Motion on September 19th, and Floy did the same the following day. On September 21, 2005, Charles filed a request for oral argument on RLI's summary judgment motions.

III. RLI's Motion for Summary Judgment

A. Parties' Contentions

1. RLI's Motion for Partial Final Summary Judgment

RLI contends that there is no dispute as to the amount of the settlement or its satisfaction of that settlement. RLI also argues that the individual Defendants (who are also the indemnitors) have presented no defense to the Indemnity Agreement itself and, in fact, they have conceded that all four individual Defendants executed the document. RLI contends that these facts alone are sufficient to establish its right to compel indemnification for the sums paid to Norwood under the terms of the settlement agreement. RLI supports its claims for payment from Defendants by

[1] Instead, Mr. Stephens offered a lengthy "counter-statement of the facts." It is contrary to this court's practice order because it does not specifically address the numbered paragraphs in Plaintiff's statement of undisputed facts. See Def's Resp. at 7–29.

arguing that a "surety's right to indemnification is the right to payment from the principal or indemnitors of any amounts claimed against the surety . . . a right well-established under common law." Pl's Br. at 7. RLI asserts that it has complied with its obligations under the Indemnity Agreement and should not be made to wait any longer for repayment by indemnitors.

RLI's current motion seeks partial summary judgment against the Defendants and order for payment in the amount of $412,500.[2] RLI specifically reserves its right to seek interest lost and attorneys' fees incurred as a result of the delay in fulfillment of the settlement terms.

2. <u>Response of Defendant Floy Stephens</u>

Defendant Floy Stephens responds to RLI's Motion for Partial Final Summary Judgment with three main arguments. First, she argues that neither the 1998 Indemnity Agreement nor the 2001 Application Agreement contain collateral security provisions and that the cases cited by RLI in support of its demand for specific performance all interpret indemnity agreements containing collateral security provisions. Collateral security agreements require indemnitors to provide collateral to be held in reserve by the surety for the coverage of future claims or losses. Here, Floy argues, RLI issued not a payment bond but a performance bond, and as such, RLI never demanded that Defendants put any funds into reserve for distribution to future claimants on the bond. Floy thus concludes that RLI is not entitled to specific performance and that the Court must find a basis for Defendants' payment under "general theories of indemnitor liability." Def's Resp. at 6–7.

[2] RLI sought payment of $537,500 in its initial summary judgment motion (the $620,500 settlement amount less the $83,000 payment received from Charles Stephens). This number was subsequently revised downward on account of a $125,000 payment received from third parties. Pl's Reply at 3.

Second, Floy argues that the operative document in Plaintiff's suit to recover from indemnitors is the 2001 Application Agreement. Floy contends that the Application Agreement superseded the 1998 Indemnity Agreement and that, not having signed the later document, she is not a valid indemnitor on the 2301 project. Floy also asserts that RLI has failed to move forward with any discovery as to whether the Indemnity Agreement is still valid and that the chronology of events indicates that only the Application Agreement was in effect for the project at issue in this suit. Finally, Floy argues that even if the 1998 Indemnity Agreement is controlling, she contests the issue of liability, though makes no assertions as to the basis of this argument.

3. <u>Response of Defendant Charles Stephens</u>

Charles argues that the Motion for Partial Final Summary Judgment should be denied for three main reasons. First, Charles argues that his participation in the settlement conference in no way constitutes an admission of liability on his part, and that RLI should be foreclosed from any attempt to use the settlement agreement as an admission. Charles also asserts that all parties, including RLI, agreed that the settlement expressly preserved all of his defenses to indemnification.

Second, Charles argues that RLI is not entitled to specific performance, since it did not seek such relief in its complaint. In a similar analysis to that contained in the response by Floy, Charles contends that the deposit of collateral security to cover future payments is not relevant, since RLI has already settled all claims against the bonds issued for BCI.

Finally, Charles contends that the motion should be denied because RLI failed to exercise valid defenses to the payment of the underlying claims to Norwood Company (specifically, failing to file a motion for summary judgment in that case). He cites case law holding that an

exception to enforcement of a principal's liability on a suretyship is a disbursement by the surety due to bad faith or fraudulent payment. Charles argues that RLI possessed absolute surety defenses to the bond claims asserted by Norwood, including: (1) that the change of project by Norwood constituted a material alteration or cardinal change of the bonded obligation without RLI's knowledge or consent; (2) that Norwood's claims against RLI are barred by material misrepresentations and omissions of Norwood and BCI when the bonds were procured; (3) that Norwood failed to comply with its obligations under the RLI bonds and the bonded subcontract and RLI's obligation under the bond should therefore be discharged; and (4) that RLI is entitled to a pro tanto discharge based on Norwood's acceptance of BCI's work and Norwood's early payment and/or overpayment of BCI.

Charles also raises other issues related to RLI's defense in its litigation with Norwood. He contends that he entered into an agreement with RLI to pay that company's counsel for the preparation of a summary judgment motion in that case, and despite paying $60,000 for such work, the motion was never filed. He argues that it was the failure of RLI to file a summary judgment motion in the Norwood action that led to the $620,500 settlement agreement in that case. Charles asserts that he should not be forced to bear the consequences of RLI's mishandling of that litigation, and that RLI's failure to assert its absolute defenses in that case constitutes a breach of his agreement with RLI. Charles contends that RLI's failure to properly defend the Norwood suit renders it a volunteer in paying the settlement and that RLI is therefore not entitled to repayment by the alleged indemnitors. Even if RLI is not rendered a volunteer, Charles argues that the uncertainty as to the reasons for RLI's decision not to file a motion for summary judgment in the Norwood case constitutes material issues of fact which cannot be resolved in the

instant motion for summary judgment.

Charles also argues that summary judgment should be denied because RLI breached its duty of good faith and fair dealing owed to him. Again, Charles cites RLI's failure to file a summary judgment motion in the Norwood action, this time arguing that it amounts to a breach. He also alleges a breach of the duty of good faith and fair dealing because the amount paid to Norwood under the terms of the settlement was not reasonable under the circumstances. The dollar amount is deemed unreasonable in light of the strong defenses which could have been, but were not, asserted by RLI in that case.

4. RLI's Reply

RLI first addresses Charles's argument that RLI failed to move for summary judgment in the original suit by Norwood. RLI argues that the Defendants' agreement to the settlement "meant that the surety's defenses and summary judgment motion would not go forward" and they should thus be prevented from rearguing a case in which an adverse judgment has been entered. Pl's Reply at 2. Moreover, if Charles and Floy wish to raise the propriety of the settlement between RLI and Norwood, RLI argues that they must show sufficient proof to convince a jury that RLI acted with a "dishonest purpose" in negotiating the agreed-upon dollar amount. Citing both Alabama and Pennsylvania law, RLI asserts that Defendants must show more than mere lack of good faith or even recklessness on the part of RLI in the settlement of its claim with Norwood.

RLI next addresses Floy's response, arguing that the terms of the 1998 Indemnity Agreement are clear and that a party cannot defeat summary judgment by a self-serving assertion which contradicts the writings between the parties. Specifically, RLI asserts that the 1998

Indemnity Agreement provided that liability for any bonds written would continue unless affirmative steps were taken to notify RLI of a desire to withdraw from the agreement.

Addressing the response of Charles, RLI argues that no matter how lengthy the recitation of issues which might have been raised in RLI's defense against Norwood, the settlement agreement effectively makes such arguments irrelevant. In support of this argument, RLI notes that the arbitration award of more than $1 million was subsequently converted into a final judgment after post-arbitration litigation. RLI also contends that the notion that it had effective defenses to offer as to the bond claim has already been fully litigated. In fact, Defendant Gary Bennett had raised these very issues in his refusal to execute the mediated settlement, and this Court issued an order confirming the final judgment and stating that the RLI-Norwood litigation was completely terminated. RLI argues that Charles should not be permitted to reassert these same objections to the original lawsuit in a separate litigation regarding his duty to repay the surety in his role as indemnitor.

Next, RLI dismisses Charles's claim that his $60,000 payment for legal fees was a cap on his liability under the indemnity agreement, noting that he offers no evidence that RLI intended to accept this limited payment in satisfaction of the entire indemnity obligation. And though Charles now argues that he would have allowed BCI to default in the arbitration proceedings in order that they could file their summary judgment motion in that case, RLI contends that Charles's counsel was notified that it would be impossible to file such a motion before the conclusion of arbitration. RLI asserts that his concurrence in the eventual mediation and settlement works against Charles's current speculation that BCI might have achieved better results by refusing to appear in the arbitration. RLI concludes that the objections to the

settlement reached in the Norwood suit do not amount to a defense in the current action to indemnify the surety.

Finally, RLI argues that since courts have been willing to grant specific performance in instances when a surety has set a reserve for future payments, the remedy should clearly be available when the surety has made actual payments on the bonds. Because this case involves the satisfaction of an immediate obligation under a mediated settlement in which Defendants' own counsel participated, RLI asserts that the indemnitors must be required to satisfy that obligation.

5. RLI's Renewed Motion for Summary Judgment Following Additional Discovery

Making use of the additional discovery period, RLI cites extensively from the depositions of Charles Stephens and Kay and Gary Bennett in the Renewed Motion. RLI argues that their testimony indicates a general knowledge that the 1998 Indemnity Agreement was only supplemented, and not superseded, by the 2001 Application Agreement. RLI also argues that Charles, in his deposition testimony, admits that there was no written document which demonstrates that RLI would file a summary judgment motion in return for his payment of $60,000.

Finally, RLI focuses on the language of the two indemnity agreements, unconditionally obligating Defendants to reimburse RLI's attorneys' fees. This provision bars any limitations as to the surety's rights, which Charles asserts were instituted through an oral agreement. RLI argues that the fact that the 1998 Indemnity Agreement expressly precludes any modification of its terms, except by writing, refutes the contentions of Charles that RLI had forfeited its indemnity rights in return for the $60,000 payment, as he is unable to reference any specific

writing to support his claim.

6. Response of Charles Stephens to Renewed Motion

Charles makes four additional arguments concerning RLI's assertion of its surety defenses in its litigation with Norwood. First, Charles maintains that the facts which entitled RLI to summary judgment in the Norwood case were not in dispute in the Norwood/BCI arbitration and thus could not have been decided adverse to BCI or RLI. Second, he contends that an arbitration award against a surety's principal does not preclude the surety from asserting its own suretyship defenses. Third, Charles maintains that RLI knew that its summary judgment motion against Norwood had merit and also was aware that it was not prevented from filing the motion by the arbitration award in the Norwood/BCI matter. Finally, Charles asserts that the enforcement of the settlement agreement in the Norwood/RLI case does not in any way indicate that he agreed with RLI's decision to settle Norwood's claims for more than $600,000. He argues that his only responsibility resulting from the settlement was a specific requirement that he pay "$83,000 on account," and that RLI has acknowledged receipt of that amount from him.

7. Response of Floy Stephens to Renewed Motion

Floy filed no additional motion in response to Plaintiff's Renewed Motion but instead incorporated her April 26, 2005 response to the original motion for summary judgment as well as the May 6, 2005 and September 19, 2005 responses by Charles to the Motion and Renewed Motion.

B. 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). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id. "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249.

"[S]ummary judgment is an appropriate method of resolving disputes concerning indemnification agreements." U.S. Fid. & Guar. Co. v. Feibus, 15 F. Supp. 2d 579, 581 (M.D. Pa. 1998) (listing cases).

C. Discussion

1. Defenses Not Presented by RLI in Its Litigation with Norwood

Charles, and by incorporation his wife Floy, argue that RLI as surety failed to present defenses which would have successfully prevented payments from RLI to Norwood. Defendants argue, *inter alia*, that RLI acted in bad faith in settling with Norwood and that Norwood overpaid and/or prematurely paid BCI. RLI contends that it did make the payments to BCI in good faith pursuant to bonds it issued on behalf of BCI and that Defendants must indemnify it for those payments. Floy and Charles contend that the failure to present these complete defenses amounts to bad faith and that they therefore should not be required to indemnify RLI.

The argument that certain defenses could or should have been asserted by the surety was rejected by this Court in Great American Insurance Co. v. Stephens, 2005 WL 2373866, at *8 (E.D. Pa. Sept. 27, 2005), and the language of the Indemnity Agreement provides no reason why the same logic should not apply in this case. The relevant case law holds that "what an

indemnitor must demonstrate to escape liability . . . depends upon the precise language used in the agreement." Fallon Elec. Co. v. Cincinnati Ins. Co., 121 F.3d 125, 129 (3d Cir. 1997). Here, the Indemnity Agreement states:

> In the event of any payment by the Surety, the Indemnitors further agree that in any accounting between the Surety and the Indemnitors, the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters herein contemplated by this Agreement under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payments made by the Surety shall be prima facie evidence of the fact and amount of the liability to the Surety.

Indemnity Agreement at ¶ 2 (emphasis added). Good faith clauses in surety agreements have usually been upheld. Feibus, 15 F. Supp. 2d at 585. The common law standard of bad faith or fraudulent payment is applied by the courts when, as in this case, there is no good faith standard set forth in the indemnity agreement. See U.S. Fid. & Guar. Co. v. Bilt-Rite Contractors, Inc., 2005 WL 1168374, at *4 n.9 (E.D. Pa. May 16, 2005) ("In surety cases where the indemnity contract contains no standard, bad faith or fraudulent payment is the sole limiting factor of a surety's enforcement of an indemnity agreement.").

The relevant case law in Pennsylvania and Alabama as to what constitutes bad faith in a surety's enforcement of an indemnity agreement notes that "Bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Feibus, 15 F. Supp. 2d at 585; Frontier Ins. Co. v. Int'l, Inc., 124 F. Supp. 2d 1211, 1214 (N.D. Ala. 2000) ("In the suretyship context, lack of good faith carries an implication of a dishonest purpose, a conscious doing of wrong, a breach of a duty through

motives of self-interest or ill will." (internal quotations omitted)). Bad faith is more than "a lack of diligence or negligence," and "even gross negligence cannot support a finding of bad faith." Feibus, 15 F. Supp. 2d at 585 (citing Klinger v. State Farm Mut. Auto Ins. Co., 895 F. Supp. 709, 713 (M.D. Pa. 1995)); Frontier, 124 F. Supp. 2d at 1214. The Court concludes Defendants have not presented any genuine issues of fact for trial that RLI's actions in defending and settling the Norwood case do not meet such a standard.[3]

Charles and Floy argue that RLI lacked good faith in negotiating the settlement with Norwood. They claim that RLI's failure to raise several defenses in that action amounts to a violation of the good faith standard in the Indemnity Agreement. The Court holds that these allegations, even if true, do not constitute a lack of good faith on the part of RLI as a matter of law. The case law makes clear that "actual liability is not a prerequisite to a surety's right of reimbursement." Great American, 2005 WL 2373866, at *7 (quoting Frontier, 124 F. Supp. 2d at 1215). Moreover, the language of the Indemnity Agreement states that "the Surety shall be entitled to charge for any and all disbursements made . . . under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed." Indemnity Agreement at ¶ 2 (emphasis added). Thus, even if the various defenses which Floy and Charles argue should have been put forth by RLI were in fact complete defenses to RLI's liability, the Defendants still fail to establish a lack of good faith in negotiating the settlement with Norwood.

[3] The parties have not raised any conflict of laws issues in this case, and, much as in Great American, the relevant law in Alabama and Pennsylvania is in agreement on the matters before the Court. 2005 WL 2373866, at *2 n.1. As can be seen above, no conflict of laws arises in this case, so the choice of law issue need not be addressed.

Additionally, courts have held that overpayment and/or premature payment, one of the specific defenses which Floy and Charles allege should have been raised, does not amount to bad faith in this context. Frontier, 124 F. Supp 2d at 1215.

Charles also attempts to show that his $60,000 payment to the law firm of Sheak and Korzun, P.C. was made specifically for the drafting and filing of a summary judgment motion in the Norwood v. RLI case. Charles asserts that the law firm's failure to file the motion in question amounts to a bad faith payment by RLI, since the defenses he paid for were not put forward. He acknowledges that has no documentation to prove such an agreement ever existed. Because Charles bears the burden of showing that his payments were to be applied to a specific task, RLI could rest on his failure to provide any such proof. RLI nonetheless argues that the $60,000 received from Charles was allocated to payment of attorneys' fees, costs, and expenses incurred in its defense in the Norwood suit. In support of this contention, RLI relies on an agreement signed by Charles, though never signed or implemented by RLI, in which he agreed to repay the sum of $102,195.01 to RLI in monthly installments of $10,000. Sheak Aff., Ex. A at 5–6. RLI asserts that this purported agreement demonstrates that, rather than a payment for the filing of a summary judgment motion in the Norwood v. RLI case, the six $10,000 payments, which Charles acknowledges having made, were in fact payments on the $102,195.01 balance owed to RLI for fees and costs already incurred. However, Charles's claims, even if true, do not create a material issue of fact, as he has not shown that he in any way indicated that these six $10,000 payments were for anything other than reimbursing RLI for pre-existing legal debts.

Under both Alabama and Pennsylvania law, when a debtor does not indicate to which debt the payment is to be applied, the creditor may apply it in any manner he chooses. See Bank

of Prattville v. Colonial Bank, 718 So. 2d 17, 19 (Ala. 1998) ("[I]f the debtor does not direct the application of his partial payments to one or the other of the debts, then the creditor, at the time of payment, may elect to apply the payments to either of the debts." (quoting Lipscomb v. Tucker, 314 So. 2d 840, 845 (Ala. 1975)); Uhl Constr. v. Fid. & Deposit Co., 538 A.2d 562, 565 (Pa. Super. Ct. 1998) ("[I]t is a general rule in Pennsylvania law that where a debtor owes more than one debt to a creditor, the debtor has the first right to specify the particular debt to which a payment is to be applied. If the debtor does not exercise this right, the creditor may apply the money to one or more of the debts in any manner in which he chooses."). Applying this rule to the payments from Charles, RLI was correct to utilize this money for whatever debt it saw fit, in this case the existing balance for attorneys' fees, costs, and expenses. The Court holds that RLI permissibly applied the payments to existing attorneys' fees and costs, since Charles has failed to provide any documentation that his $60,000 payment was to be used for future legal fees incurred in drafting a motion for summary judgment.

RLI's failure to submit a summary judgment motion in the Norwood case therefore does not as a matter of law constitute bad faith under the terms of the Indemnity Agreement. The Court concludes that the evidence in the record is insufficient to raise an issue of fact for trial that RLI acted in bad faith in defending the action against Norwood or in failing to file a summary judgment motion in that case.

2. The 1998 Indemnity Agreement Remains in Effect Despite the Existence of the 2001 Application Agreement

Floy's argument as to the applicability of Indemnity Agreement to the bonded project at issue remains before the Court. Floy argues that the 2001 Application Agreement, which she did

not sign, superseded the 1998 Indemnity Agreement, thus freeing her of liability to RLI as an indemnitor on the 2301 Project. The Indemnity Agreement specifically addresses the effect of later agreements:

> The Indemnitors hereby acknowledge that this agreement is intended to cover whatever bonds (whether or not covered by any other agreement of indemnity signed at any time by one or more of the Indemnitors — all other agreements of indemnity of any kind being supplemental to this), may be executed by the Company on behalf of the Indemnitors, or any one of them (whether contracting alone or as a joint or co-adventurer), from time to time, and over an indefinite period of years, until this agreement shall be canceled in accordance with the terms hereof.

Indemnity Agreement at ¶ 25. Thus, absent withdrawal from the Agreement by any or all of the them, Defendants remain liable for whatever bonds were executed on their behalf by RLI, notwithstanding the subsequent 2001 Application Agreement. The Indemnity Agreement also provides for a specific method of termination: "This Agreement may be terminated by the Indemnitors upon twenty days' written notice sent . . . to the Surety . . . but any such notice of termination shall not operate to modify, bar, or discharge the Indemnitors as to the Bonds that may have been theretofore executed." Id. at ¶ 23.

Floy presents no evidence of her termination of the 1998 Indemnity Agreement and asserts only that "the chronology of events suggests that the Agreement Mrs. Stephens signed was superceded [sic] by the subsequent one demanded by Plaintiff of Bennett Composites and Charles Stephens, exclusively, in advance of bonding the project in Pennsylvania." Def's Resp. at 8. A defendant cannot create a material issue of fact through self-serving allegations which contradict the clear terms of a contract between the parties. Brown v. Peoples Sec. Ins., 890 F. Supp. 411, 414 (E.D. Pa. 2005). Because Floy raised no specific allegations of termination of the

Indemnity Agreement prior to the execution of the bonds on the 2301 Project, the Court concludes that Floy has failed to raise a genuine issue of material fact for trial and that she is bound by the terms of the 1998 Indemnity Agreement.

3. Conclusion

Kay Bennett and Gary L. Bennet have not responded to either Plaintiff's Motion for Partial Final Summary Judgment or Plaintiff's Renewed Motion, and the Court therefore grants as unopposed RLI's motion for summary judgment against these defendants. Floy and Charles have not called into question the documentation supporting the payments made to Norwood by RLI nor have they raised any challenge to the validity of the Indemnity Agreement.[4] RLI has thus established the requirements for recovery and there are no material fact issues for trial. Therefore, the Court will grant summary judgment in favor of RLI and against Defendants Kay

[4] The Court notes that Gary Bennett, Charles Stephens, and Floy Stephens alleged in their respective depositions that Floy did not in fact sign the 1998 Agreement of Indemnity as she had previously acknowledged in multiple pleadings filed in this case. Specifically, Mrs. Stephens has admitted to signing the Indemnity Agreement in her Answer, Answer to Interrogatories, Response to Requests for Admission, Motion to Dismiss, and Response in Opposition to Motion for Partial Summary Judgment. She now contends that she never signed the document and that someone without permission to do so signed in her stead — a conclusion reached after she examined the handwriting on the document.

Floy Stephens made an identical claim in Great American, and the Court, in ruling on her motion to amend her affirmative defenses, refused to permit the change, noting that she had an opportunity to offer such a defense from the outset of the case. Great American, 2005 WL 2373866, at *4 n.4, *9. Here, Floy again seeks to change her defense in the late stages of the case. Though she has made no motions to amend her answer or any pleadings, the Court addresses her deposition testimony only insofar as her alleged failure to sign the document could be considered a genuine issue of material fact for trial as to her liability as an indemnitor.

The Third Circuit has held that unequivocal judicial admissions are "binding for the purpose of the case in which the admissions are made[,] including appeals." Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972). Moreover, statements in pleadings are to be regarded as admissions, Giannone v. U.S. Steel Corp., 288 F.2d 544 (3d Cir. 1956), including statements and concessions made within briefs, as well as pleadings. Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 235 (3d Cir. 1998). Because Floy acknowledged signing the Indemnity Agreement in the many pleadings listed above, the Court refuses to consider the contentions of forgery raised in Floy's August 24, 2005 deposition.

Bennett, Gary L. Bennett, Floy Stephens, and Charles H. Stephens.

An appropriate Order follows.

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

RLI INSURANCE CO.	:	CIVIL ACTION
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v.	:	
	:	
BENNETT COMPOSITES, INC., et al.	:	NO. 04-272

ORDER

AND NOW this 2nd day of November, 2005, upon consideration of the Motion for Partial Final Summary Judgment and the Supplemental Motion for Enforcement of Its Rights of Indemnity and for Partial Summary Judgment Against All Defendants (Docket Nos. 23 and 36), and the responses thereto, it is ORDERED that Plaintiff's Motion for Partial Final Summary Judgment is GRANTED and Plaintiff's Supplemental Motion for Enforcement of Its Rights of Indemnity and for Partial Summary Judgment Against All Defendants is DENIED as moot.

Judgment is entered in favor of Plaintiff RLI Insurance Company and against Defendants Kay Bennett, Gary L. Bennett, Floy Stephens, and Charles H. Stephens jointly and severally in the amount of $412,500.

It is further ORDERED that Plaintiff shall file a motion as to the amount of interest,

attorneys' fees, and costs requested within ten (10) days of this Order. Defendants shall file their response within ten (10) days thereafter.

BY THE COURT:

s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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