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

LEHIGH CEMENT COMPANY f/k/a LEHIGH PORTLAND CEMENT COMPANY	:	CIVIL ACTION
v.	:	
STEADFAST INSURANCE COMPANY	:	NO. 04-4906

MEMORANDUM

Bartle, C.J. January 6, 2006

Plaintiff Lehigh Cement Company ("Lehigh") has brought this diversity action against defendant Steadfast Insurance Company ("Steadfast"). Lehigh asserts a breach of contract claim due to Steadfast's refusal to indemnify it for damages allegedly covered under an "Owner's Protective Professional and Environmental Liability Insurance Policy" (the "OPEL Policy") issued to it by Steadfast. In addition, Lehigh requests declaratory relief.

Before the court is the motion of Steadfast for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on both claims.

I.

Under Rule 56(c), we may grant summary judgment only "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 summary judgment as a matter of

law." Fed. R. Civ. P. 56(c); see also Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Boyle, 139 F.3d at 393. We review all evidence and make all reasonable inferences from the evidence in the light most favorable to the non-movant. See Wicker v. Consol. Rail Corp., 142 F.3d 690, 696 (3d Cir. 1998). The non-moving party may not rest upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990).

II.

The following facts are either undisputed or stipulated to by the parties solely for purposes of this motion, and they are viewed in the light most favorable to plaintiff.

Lehigh is a Pennsylvania corporation, with its principal place of business in Allentown, Pennsylvania. On or about December 15, 2000, Lehigh entered into an agreement with National Refractories and Minerals Corporation ("NRM") whereby NRM would furnish "the labor, materials and supervision required to supply refractory materials for lining" furnace equipment in Lehigh's cement manufacturing plant in Union Bridge, Maryland. These refractory lining materials include anchors, wear lining and insulation for various equipment. The process of manufacturing cement requires that rock be calcined (changed from calcium carbonate to calcium oxide), partially liquified, and

then cooled, all under highly specific operating conditions. The agreement, memorialized in refractory purchase order number 45-88056 (the "NRM purchase order"), required NRM to manufacture the required materials as well as provide certain engineering and technical work.

The NRM purchase order was part of Lehigh's larger effort to modernize the Union Bridge plant in several respects. Before Lehigh entered into the agreement with NRM, it purchased the OPEL Policy from Steadfast, a Delaware corporation with its principal offices in Illinois. The coverage period was from February 11, 1999 to February 11, 2002.[1] Lehigh obtained the OPEL Policy to insure against any errors or omissions of the third-party "design professionals"[2] with whom it would contract to perform work on the Union Bridge plant. Pursuant to the terms of the OPEL Policy, Steadfast agreed to indemnify Lehigh "for 'Damages' arising out of an act, error, or omission by a 'Design Professional' during the rendering of 'Professional Services,' to the extent said 'Damages' are in excess of the 'Design Professional's Insurance.'" OPEL Policy § I. The OPEL Policy also contains several exclusions, including a prohibition of coverage for the "design or manufacture of any goods or products

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1. At some point, the parties apparently extended the policy period to January 1, 2003.

2. The OPEL Policy defines "design professionals" as "those persons or entities or successors legally qualified to perform architecture, engineering, land surveying, construction management 'Professional Services,' or environmental consulting services." OPEL Policy § II.J.

which are sold or supplied by the 'Design Professional.'" OPEL Policy § III.F. Lehigh, the named insured, paid $260,000 to procure a coverage limit of $15 million for claims covered under the policy. This coverage limit sits in excess of a $500,000 minimum "Design Professional's Insurance" required to be held by the "Design Professional" as the named insured. The policy also contains a required $500,000 self-insured retention.

Shortly after the completed installation of NRM's refractory lining work in late 2001, the Union Bridge facility began encountering serious problems. The refractory linings did not expand properly in a horizontal direction, causing them to buckle and fail, and the metal anchor system failed to withstand the operation temperatures at the plant. The parties dispute the reasons behind these failures.

The refractory problems have necessitated substantial repairs following the installation, with total costs to Lehigh in excess of $6 million to date. Before the work for Lehigh was even completed, NRM filed a petition for bankruptcy under Chapter 11 with the United States Bankruptcy Court for the Northern District of California, Oakland Division on October 20, 2001. On August 6, 2002, Lehigh first sent written notice to NRM of "defects, failures, and other problems with the refractory material and anchors supplied by" NRM. On or around December 10, 2002, Lehigh, through its broker J&H Marsh & McLennan ("Marsh"), wrote to Steadfast that it was putting the insurer on notice of "potential claims arising from design errors in the refractory

material and the refractory anchors" at the Union Bridge plant. Lehigh filed an amended proof of claim with the Bankruptcy Court on June 13, 2005 for an amount "not less than $5,254,106.49." There has not yet been any determination in the Bankruptcy Court or otherwise concerning NRM's liability for those damages.

III.

Steadfast moves for summary judgment on several grounds. First, it argues that it has no responsibility to indemnify Lehigh for its losses because Lehigh did not provide it with timely notice of the refractory problems as required under the OPEL Policy. Second, Steadfast maintains there are no "Damages" as that term is defined in the OPEL Policy and thus Lehigh has no basis for recovery. Third, Steadfast contends that NRM did not maintain required "Design Professional's Insurance," an alleged condition precedent to Lehigh's ability to seek coverage under the OPEL Policy. Fourth, according to Steadfast, Lehigh has no right to sue because of its alleged non-compliance with certain conditions precedent to bringing an action under the OPEL Policy. Finally, Steadfast submits that even if Lehigh's conduct does not vitiate the OPEL Policy, certain exclusions under the policy bar any recovery.

We turn first to Steadfast's argument that Lehigh has failed to obtain the necessary prior determination of "Damages" against NRM before seeking to collect from Steadfast under the OPEL Policy.

The OPEL Policy is limited to indemnifying Lehigh for "damages," or "the monetary amount [Lehigh] is legally entitled to recover from each 'Design Professional' ... either by adjudication by a court of competent jurisdiction or by settlement, arbitration or other method of dispute resolution to which [Steadfast] agrees in writing." OPEL Policy § II.I. These "damages" must arise from "a negligent act, error or omission on the part of the Design Professional." Id. It is conceded that Lehigh has not obtained an adjudication, settlement, or other resolution of its claim against NRM for its negligence as a "Design Professional" under the OPEL Policy, and NRM is not a party to this action.

Lehigh counters that NRM's ongoing bankruptcy proceedings have precluded their ability to obtain any adjudication against NRM. Any damages Lehigh would seek to recover from NRM are property of the bankruptcy estate, says Lehigh, and thus governed by the automatic stay provision contained in 11 U.S.C. § 362(a). Lehigh thus contends that it has availed itself of the only avenue currently open to it by filing a proof of claim (and subsequent amended proof of claim) in the Bankruptcy Court for the Northern District of California. It further argues that the question of NRM's negligence in designing the refractory linings is the proper subject of the instant action.

Lehigh's argument is not persuasive. The plain language of the OPEL Policy requires Lehigh to secure the

specific monetary amount it is entitled to recover from NRM "either by adjudication by a court of competent jurisdiction or by settlement, arbitration or other method of dispute resolution to which [Steadfast] agrees in writing." OPEL Policy § II.I. The NRM bankruptcy proceedings are still pending in which Lehigh has filed an amended claim for "not less than $5,254,106.49." Lehigh advances no reason why the Bankruptcy Court cannot resolve its underlying dispute with NRM. Even if Lehigh has proceeded, as it states, to the best of its ability to prove the validity and amount of its claim against NRM, the matter as of now remains undecided. The existence of the claim without more is simply not enough to satisfy the precedent condition set forth in the OPEL Policy. There must be a final resolution of Lehigh's underlying claim against NRM by one of the means outlined in the OPEL Policy before Steadfast has any obligation to indemnify Lehigh.

We conclude that both the breach of contract and declaratory judgment claims are not ripe for adjudication absent the required underlying determination of the amount of damages Lehigh is entitled to recover from NRM as a result of services covered by the OPEL Policy. Since the pending dispute between Lehigh and Steadfast is not at a point where it can be decided by this court, we need not reach the other issues raised by Steadfast.

There is one final matter, however, with which we must deal. Our Court of Appeals has held that "[b]ecause ripeness affects justiciability, ... unripe claims should ordinarily be

disposed of on a motion to dismiss, not summary judgment." Taylor Inv. Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1290 (3d Cir. 1993). To that end, the Court of Appeals agreed with the District Court in Taylor that plaintiff's civil rights claims were not yet ripe but vacated judgment for defendants and remanded with instructions to dismiss the complaint. Id. at 1295. Accordingly, for the foregoing reasons, the motion of Steadfast for summary judgment pursuant to Rule 56 must be denied. Instead, the complaint will be dismissed without prejudice for lack of ripeness.

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ORDER

AND NOW, this 6th day of January, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Steadfast Insurance Company for summary judgment is DENIED. Because plaintiff's claims are not yet ripe, however, the complaint is DISMISSED without prejudice.

BY THE COURT:

/s/ Harvey Bartle III
C.J.