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. **February 1, 2006**

The issue presented concerns attorneys fees to which the Plaintiff is entitled under an indemnity contract, following this Court's Memorandum and Order entering judgment in favor of Plaintiff and against Defendants in the amount of $412,500. RLI Ins. Co. v. Bennett Composites, Inc., 2005 WL 2902496 (E.D. Pa. Nov. 2, 2005). The Court's Order of November 2, 2005 provided for counsel for Plaintiff to file the pending motion as to the amount of interest, attorneys fees, and costs requested, giving Defendants an opportunity to respond.

In support of its Application for Attorneys Fees, Expenses, Interest and Costs, Plaintiff has filed Affidavits from two of its counsel, J. Charles Sheak, and Timothy Winship, supported by voluminous records. In opposition, Defendant Charles Stephens ("Stephens") has filed a Memorandum in Opposition, also supported by voluminous records. Defendant Floy Stephens has joined Mr. Stephens' response.

As the Court understands the Stephens' objections, he does not dispute that under the indemnity contract, he and the other Defendants are liable for attorneys fees, at least since the Court has found that the Defendants are liable under the indemnity contract for the amount of

money which RLI had to pay pursuant to the indemnity contract. Nonetheless, Stephens asserts that the attorneys fees which RLI has attempted to claim pursuant to the contract are grossly overstated and improper.

The indemnity agreement at issue in this case contained a "prima facie evidence" clause, which noted 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. Courts have enforced "prima facie evidence" provisions in surety contracts. U.S. Fid. & Guar. Co. v. Bilt-Rite Contrs., 2005 WL 1168374, at *3 (E.D. Pa. May 17, 2005) (citing Fallon Elec. Co. v. Cincinnati Ins. Co., 121 F.3d 125, 129 (3d Cir. 1997). As mentioned above, in seeking reimbursement for attorneys fees and costs, Plaintiff has provided both affidavits and expense sheets in order to document the disbursements incurred by RLI related to enforcement of the surety bond. See, e.g., Plaintiff's Application for Award of Attorney's Fees, Expenses, Court Costs, and Interest; Affidavit of J. Charles Sheak in Support of Application for Fee. The Court finds the prima facie evidence clause and accompanying proofs sufficient to shift the burden to Defendants to provide evidence that Plaintiff cannot recover the costs, fees, and expenses it incurred with respect to the projects covered by the surety bond at issue.

Under Third Circuit law, attorneys fees that are due under an indemnity contract are governed by contractual principles. The Third Circuit has held that a standard of "good faith" controls recovery of sums under indemnity agreements, as the Fallon court held that the standard for "what an indemnitor must demonstrate to escape liability for attorney's fees depends upon the precise language used in the agreement." 121 F.3d at 129. The Court holds that the good faith language of paragraph two of the indemnity agreement controls. The indemnity agreement

between the parties reads in part:

> "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 . . . .

Indemnity Agreement at ¶ 2 (emphasis added). Therefore, in order to escape their payment obligation, Defendants must show that Plaintiff's payments violated the good faith standard of the indemnity agreement. The standard of proof is preponderance of the evidence. See Bilt-Rite, 2005 WL 1168374, at *4 (citing Mountbatten Sur. Co. v. Jenkins, 2004 WL 2297405, at *6 (E.D. Pa. Oct. 13, 2004)).

Stephens' objections, in summary, are of several types:

1. He asserts that the RLI standards on what fees it will pay in cases of this nature were not followed, and in fact, were flagrantly ignored and violated.

2. Whereas the RLI standards only allow one partner, one associate, and one paralegal to work on a particular case, in this case there were at least two partners from the same firm. In addition, Stephens asserts that two other firms joined the original Plaintiff's firm with no explanation as to why they had to be retained, and he objects to paying fees for these additional law firms.

3. Stephens asserts that the terms of the indemnity contract were clear and that RLI grossly overpaid fees charged for the Motion for Summary Judgment, which was only seeking relief on the fairly simple contractual issue.

4. Stephens also objects to payment of interest.

Although Mr. Sheak has filed a reply affidavit to Stephens' Motion, the Court finds that it does not fairly meet or even discuss the specific objections which Stephens has raised to this issue. Stephens asserts that the RLI payments to its counsel were made in bad faith. The Court finds that Stephens has presented sufficient facts and arguments to allow further investigation on these points, and therefore, the Court will allow limited discovery, and if necessary, hold a hearing to resolve these issues. The Court concludes that it can, in this manner, resolve the issue more fairly than only by relying on the papers that are now before the Court.[1]

The Court also notes that although Mr. Sheak, counsel of record for RLI, has supplied affidavits on the position of RLI and his firm, the Court believes, given the nature of Stephens' objections, that RLI itself, by an authorized and knowledgeable officer or managing agent, should provide a declaration setting forth its position in detail on the issues raised by Stephens' objections.

Defendants Gary Bennett and Kay Bennett, ("Bennetts"), appearing pro se, have filed a pleading which consists of the following motions:

1. Motion to Set Aside the Court's November 2, 2005 Order.

2. Objections to the Court's Memorandum.

3. Motion to Continue Discovery.

4. Motion to Suspend All Actions Against Bennett Composites and Its Indemnitors.

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[1] Although this is a matter in which the parties should consider settlement, the history of attempted settlements in this case is not a favorable one. Therefore, the Court will not require the parties to undergo any settlement discussions; however, if the parties voluntarily choose to do so, the Court will make the services of Magistrate Judge Strawbridge available for this purpose, provided the parties have thoroughly discussed settlement with each other beforehand and come to Magistrate Judge Strawbridge with defined positions and with each party's negotiators fully authorized to settle the case.

5. Motion to Set Aside the Arbitration Award in Favor of a Jury Trial.

The Court will treat the Bennetts' Motion as a Motion under F.R. Civ. P. 59(e). The Bennetts' motion is merely repetitive of arguments that they have made throughout the litigation, namely that the mediated settlement agreement reached before Judge Lowell Reed of this Court in Norwood Co. v. RLI Insurance Co., 01-CV-6153, is not valid and that the arbitration award upheld in Norwood Co. v. Bennett Composites, Inc., 2004 WL 1895193 (E.D. Pa. Aug. 24, 2005), should be reopened. Plaintiff has responded to this Motion in its Affidavit by J. Charles Sheak filed with this Court on December 27, 2005. In his opposition, Mr. Sheak noted that Bennetts' motion is simply an illustration of "the compounding litigation problems that RLI has had to deal with in these matters." Sheak Reply Affidavit at 4. He argues that these issues have been litigated and decided by this Court and that the motion should therefore be denied.

When deciding a Rule 59(e) motion for reconsideration, a court may alter or amend a judgment "if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 676 (3d Cir. 1999). Reconsideration is an extraordinary remedy, made available to correct manifest errors of law or fact, or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Mere dissatisfaction with the Court's ruling is not the basis for such a reconsideration, nor can such a motion be used as a means to put forth additional arguments which could have been made but which the party neglected to make. Waye v. First Citizen's Nat'l Bank, 846 F. Supp. 310, 314 (M.D. Pa.), aff'd, 31 F.3d 1175 (3d Cir.

1994).

The motion in this case brings forth no controlling rule of law showing that the Court erred in its November 2, 2005 Memorandum and Order granting summary judgment to Plaintiff. Similarly, the Bennetts have failed to provide any new evidence which would make the Court reconsider it position on the matters decided in its prior opinion. Therefore, all five of the grounds for relief set forth in the Bennetts' pleading will be denied.

With the above explanation, the Court enters the following Order.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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v.	:	
	:	
BENNETT COMPOSITES, INC., et al.	:	NO. 04-272

ORDER

AND NOW, this 1st day of February, 2006, it is hereby ORDERED as follows:

1. Defendants Kay and Gary Bennett's Motion to Set Aside the Court's November 2, 2005 Order, Objections to the Court's Memorandum, Motion to Continue Discovery, Motion to Suspend All Actions Against Bennett Composites and Its Indemnitors, and Motion to Set Aside the Arbitration Award in Favor of a Jury Trial (Docs. No. 61 and 69) and Supplemental Motion to Set Aside the Court's November 2, 2005 Order, Objections to the Court's Memorandum, Motion to Continue Discovery, Motion to Suspend All Actions Against Bennett Composites and Its Indemnitors, and Motion to Set Aside the Arbitration Award in Favor of a Jury Trial (Doc. No. 68) are DENIED.

2. Counsel shall confer within the next ten (10) days to see if they can agree on a procedure of submitting declarations, further documents and/or take depositions to resolve the objections presented by Defendants Charles and Floy Stephens to the Plaintiff's Application for Attorneys Fees, Interest, Expenses, and Costs.

3. Within ten (10) days thereafter, an authorized officer or agent of RLI shall submit an affidavit or declaration setting forth in sufficient detail RLI's position and response to the objections filed by Defendant Stephens.

4. The parties will have fourteen (14) days thereafter to take up to three (3)

depositions for each side, which depositions shall be limited to no more than four (4) hours each. Any documents relevant to the deposition shall be produced before the deposition.

5. The Court will hold a telephone conference call on Tuesday, March 14, 2006 at 4:00 p.m. on the record with counsel, and any unrepresented parties who wish to participate, to discuss what procedures shall follow, which may include an evidentiary hearing. Plaintiff's counsel will initiate the call and when all parties are on the line, call chambers at 267.299.7520.

BY THE COURT:

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