

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, SUBSCRIBING TO POLICY NO.
B0711,

Plaintiffs,

v.

Civil Action No.: 06-C-186

PINNOAK RESOURCES, LLC and
PINNACLE MINING COMPANY, LLC,
Defendants.

ORDER

This matter came before the Court upon Defendants PinnOak Resources and Pinnacle Mining's motion to dismiss the Plaintiffs First Amended Complaint. A hearing was held in this matter on the 23rd day of February, 2007. After reviewing the case file, the parties motions and briefs, and the relevant in West Virginia, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On February 6, 2004 PinnOak Resources and Pinnacle Mining Company, the above named Defendants, filed suit (Civil Action 04-C-30) against Certain Underwriters at Lloyd's, London, in the Circuit Court of Wyoming County, West Virginia. PinnOak sought to recover insurance proceeds allegedly due under insurance coverage policies in effect at the time of a series of methane ignitions which began on August 31, 2003 at the Pinnacle Creek Mine in Pineville, West Virginia.
2. Syndicates 1183 and 1200, the Plaintiffs in the above styled action, were among the Certain Underwriters at Lloyd's which subscribed to insurance policies which covered PinnOak at the time of the August 2003 losses at the Pinnacle Creek Mine. Several other syndicates also subscribed to those insurance policies.

3. PinnOak settled in 2004 and 2005 with some of the insurers which were parties to Civil Action 04-C-30. On May 30, 2006, PinnOak and Certain Underwriters at Lloyd's, London subscribing to Broker Policy Nos. AN0300337 and AN0300338, entered into a "Global Settlement Agreement and Release" for the remaining insurers' share of the loss. Syndicates 1183 and 1200 were parties to this settlement agreement as member underwriters of policy AN0300338.

4. Despite facing potential liability in the tens of millions of dollars in Civil Action 04-C-30, Syndicates 1183 and 1200 allegedly agreed to provide PinnOak and Pinnacle Mining Company with further insurance coverage.

5. The Plaintiffs in the case at hand allege that the parties entered into a five-year coverage contract to begin June 30, 2004 and to end June 30, 2009. The Underwriters allege that PinnOak agreed to pay a \$375,000 annual premium for this coverage plus an additional \$6,250,000 premium in annual installments of \$1,250,000. The first of these installments only became payable on settlement of the August 2003 loss. PinnOak, Plaintiffs allege, could elect not to review the 2004-2009 policy at the end of each policy year but in the event of non-renewal, the balance of the \$6,250,000 became "payable in full" after settlement of the August 31, 2003 loss.

6. PinnOak opted not to renew the five year coverage policy at the end of the first year and had up to that time paid all annual premiums. At the time PinnOak opted not to renew this policy, the parties had not entered into the "Global Settlement Agreement and Release" and litigation was ongoing.

7. Subsequent to the alleged entry and cancellation of the 2004-2009 coverage contract the parties to Civil Action 04-C-30 entered into the above-mentioned "Global Settlement Agreement and Release."

8. Shortly after entering into the "Global Settlement Agreement and Release," the Plaintiffs herein filed the above-styled civil action on the theory that the Defendants had breached the alleged June 2004 agreement by not paying \$6,250,000 as allegedly required by the June 2004 agreement upon the settlement of the claims surrounding the August 31, 2003 loss.

9. Each side refers to a "slip" which allegedly memorializes the June 2004 agreement and identifies the terms of the June 2004-June 2009 coverage policy.

10. Three (3) separate times in this "slip," the payments which Plaintiff allege to be an additional premium are referred to and the word "payback" is used. The first such time comes under the section identified as "Conditions:";

In the event of losses hereon the Assured will self-insure on this layer a USD amount equivalent to 50% of the August 2003 loss to this layer not exceeding USD 12,500,000 in all less 5 equal annual installments of USD 1,250,000 the first payment being due after settlement of the August 2003 loss. *in the event of non renewal the full payback becomes payable in full*
(Italicized portions added to reflect that these words appear to be handwritten on the "slip.")

The word "payback" is used once again under the heading "Premium:";

USD 375,000 (100%) Annual
Plus USD 1,250,000 (100%) Payback Annual, payable on
settlement of the August 2003 loss
(Italicized portions added to reflect that these words appeared to be handwritten on the "slip.")

Finally, the term "payback" is used again under the heading "Brokerage:";

20% or net equivalent downwards to be agreed by Slip Leader (Nil brokerage in respect of Payback)

11. Defendant's allege that the term "payback" is clearly used in connection with the settlement of the August 2003 loss under the "Conditions:" and "Premium:" headings of the "slip."

12. Plaintiffs allege that the term "payback" must be read in light of the "slip" as a whole and as such only refers to a premium and was not a "payback" of the settlement sum as PinnOak argues.

13. Plaintiffs have not alleged any other amount of money or fund from which a "payback" to the underwriters from PinnOak would be applicable. The record reveals no such amount of money which PinnOak could be required to "payback" to the Certain Underwriters at Lloyd's other than the settlement amount contemplated by the "Global Settlement and Release Agreement" that settled the litigation concerning the August 2003 loss. The record reveals no other sum of moneys paid unto PinnOak by the Insurers which PinnOak could allegedly be required to "payback" to the Insurers.

14. Defendants allege at least three (3) separate provisions of the Settlement Agreement each bar Plaintiff's claims. Defendants cite a "merger clause:"

This agreement constitutes the entire agreement between PinnOak, Insurers, and Vericclaim regarding the subject matter hereof, and supercedes all other prior discussions, agreements and understandings, both written and oral, with respect thereto. This agreement shall not be amended, modified or assigned except by express written agreement of PinnOak, Insurers, and Vericclaim.

(Settlement Paragraph 10)

Defendants further cite an "Anti-Reimbursement and Contribution Provision:"

Insurers shall not, under any legal theory, seek reimbursement of, or contribution toward, the advances and sum to be paid to PinnOak described in Paragraph 1 of the "Agreements" above, from any other insurer or from any other present or former party to the Coverage Action, except with respect to the rights that Insurers may have with respect to reinsurers pursuant to reinsurance agreements, contracts or relationships.

(Settlement Paragraph 8)

Defendants also cite a "General Release Provision:"

In consideration of the agreements set forth herein, each of the Insurers . . . hereby releases and discharges PinnOak . . . from all actions, or causes of action whether in contract or tort (each including but not limited to

statutory or common law claims, claims for attorneys fees, unfair or improper practices or methods of competition, consumer protection acts or bad faith), suits, debts, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims,

and

demands whatsoever, in law, admiralty or equity, which the Insurer Releasers ever had, now have or hereafter can, shall or may have, for upon or by reason of the Loss.

(Settlement Paragraph 4)

15. Defendants also cite an "Indemnification Provision" which they allege emphasizes the intent of all the parties to walk away from all prior dealings:

Each of the Insurers, and VeriClaim, shall protect, indemnify, and save PinnOak . . . by policy number only, harmless from and against any and all claims, demands, liabilities and causes of actions of every kind and character brought by any party purporting to or attempting to assert any claim by, through, or on behalf of any of the Insurers . . . growing out of, or resulting directly or indirectly from, the Loss.

(Settlement Paragraph 7)

16. The Plaintiffs allege and maintain that the "Global Settlement Agreement" applies only to PinnOak's claims against its insurers arising from the August 31, 2003 loss and asserted in PinnOak's lawsuit filed on February 6, 2004. They allege that the "Agreement" never mentioned or referred to the 2004-2009 policy now sued upon and that the "Loss" referred to in the agreement was limited to the August 31, 2003 claim.

17. PinnOak Resources filed a 12(b)(6) motion to dismiss the complaint for failure to state a claim or in the alternative a motion for summary judgment under rule 56 of the West Virginia Rules of Civil Procedure. The underwriter Plaintiffs requested that this Honorable Court provide notice of the conversion of the Defendant's 12(b)(6) motion into a Rule 56 summary judgment motion as provided by the rules of civil procedure. Plaintiffs stated that with that notice and reasonable time they would secure

an affidavit from Simon White. Plaintiffs alleged that Mr. White was personally involved in the negotiations of the 2004-2009 policy.

18. The Court took the opportunity at the February 6, 2007 hearing to request that the Plaintiffs secure Mr. White's affidavit and provide it to the Court. The Court did so to avoid any unnecessary delay in the event that the Court made the decision to convert the Rule 12(b)(6) motion into a Rule 56 motion. Plaintiffs, through counsel Timothy G. Church and Gerald Hayden, secured that affidavit and filed it appropriately with the Court on March 15, 2007.

19. The affidavit of Mr. White adds little to the argument already alleged by Plaintiffs' counsel. Mr. White alleges that he is "personally familiar" with the "Slip" which allegedly memorializes the 2004-2009 agreement and its terms. Mr. White essentially states the same allegations argued by Plaintiffs counsel in argument on the Defendant's motion to dismiss. Mr. White does not allege that he had any connection with the negotiation of the "Global Settlement Agreement and Release" but merely restates language from that agreement.

20. The "Global Settlement Agreement and Release" is sufficiently clear and free from ambiguity so that the Court may give the agreement its proper force and effect.

CONCLUSIONS OF LAW

19. "The purpose of a motion under Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure* is to test the formal sufficiency of the complaint." *John W Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 604, 605, 245 S.E.2d 157, 158 (1978).

21. "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the

pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *W.Va.R.Civ.P.* 12(b) [1998], in part.

22. "[I]f a circuit court considers matters outside the pleadings in connection with a motion to dismiss, we must treat the motion as one for summary judgment. Failure to treat such a motion as one for summary Judgment and to provide the litigants with notice and an opportunity to respond can constitute reversible error." *Harrison v. Davis*, 197 W.Va. 651, 657n. 16, 478 S.E.2d 104, 110 n.16 (1996).

23. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)..

24. The Court, under the authority of Rule 12(b)(6), converts the Defendants' motion into a Rule 56 motion for summary judgment and considers it as such. The Plaintiffs had previously requested that if the Court made such a decision that they be provided with notice and a reasonable opportunity to submit the affidavit of Mr. Simon White.

24. The Court took the opportunity at the February 6, 2007 hearing to request that the Plaintiffs secure Mr. White's affidavit and provide it to the Court. The Court did so to avoid unnecessary delay in the event that the Court made the decision to convert the Rule 12(b)(6) motion into a Rule 56 motion. Plaintiffs, through counsel Timothy G. Church and Gerald Hayden, secured that affidavit and filed it appropriately with the Court on March 15, 2007.

23. Settlement agreements are to be construed as any other contract. *Triad Energy Corp. of West Virginia, Inc. v. Renner*, 215 W.Va. 573, 576 (2004).

24. The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. Syl. Pt. 5, *Horace Mann Insurance Co. v. Adkins*, 215 W.Va. 297 (2004); Syl. Pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91 (1968).

25. The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court. Syl. Pt. 5 *Flanagan v. Stalnaker*, 216 W.Va. 436 (2004); Syl. Pt. 1, *Berkeley County Public Service District v. Vitro Corporation of America*, 152 W.Va. 252 (1968).

26. A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent. Syl. Pt. 1, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33 (2005); Syl. Pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484 (1962).

27. Extensive litigation preceded the May 2006 settlement of Civil Action 04-C-30. The "Global Settlement Agreement and Release" which put an end to that litigation is heart of the current litigation. The Plaintiff references that agreement in its First Amended Complaint and the Defendant has extensively referenced that agreement in its Motion to Dismiss and has attached a copy of such agreement to its motions. Both parties argued at length as to the meaning of that settlement agreement at the hearing on

the Defendants' Motion to Dismiss. This agreement is the true substance of the parties' positions.

28. The "Global Settlement Agreement and Release" is clear and unambiguous and should be given its proper force and effect. The "Agreement," through the merger clause, anti-reimbursement and contribution, and general release provisions, clearly evidences the intent of the parties to settle and walk away from all disputes and outstanding claims related to the August 2003 loss. Syndicates 1183 and 1200, the Plaintiffs herein, were parties to that agreement.

29. The anti-reimbursement and contribution provision clearly prevents the Plaintiffs herein from seeking "reimbursement of, or contribution toward" the settlement amount "under any legal theory." The 'slip' that the Plaintiffs themselves have attached as Exhibit 1 to their First Amended Complaint on three separate occasions refers to a "payback" which would become due upon settlement of the August 31, 2003 loss. No other payments had been made or would be made to PinnOak or Pinnacle Mining Co. which the Syndicates could have claimed a "payback" to be made from.

30. The alleged June 2004 agreement was both allegedly entered into and not renewed prior to the time the parties entered into the "Global Settlement Agreement and Release." The alleged "payback" monies owed under this alleged contract appear to be an alleged attempt by the Plaintiffs to assure recovery of potential settlement monies directly resulting from the August 2003 loss. The "GLOBAL Settlement Agreement and Release" (emphasis added) prevents the Plaintiffs from attempting to seek reimbursement or contribution from the settlement funds resulting from the August 2003 loss. At the time the parties entered into the "Global Settlement Agreement and Release" this alleged debt would have become outstanding. The merger, anti-reimbursement and contribution,

general release, and indemnification provisions of the "Global Settlement Agreement and Release" show the intent of the parties to walk away from all disputes and outstanding claims related to the August 2003 loss.

31. The Defendants are entitled to Summary Judgement as a Matter of Law in as much as the current action to recover the "payback" of settlement monies is barred by the terms of the "Global Settlement Agreement and Release." There are no genuine issues of material fact and the Defendants are entitled to summary judgment as a matter of law.

ACCORDINGLY, it is **ORDERED**, that the Defendant's Motion for Summary Judgment is hereby **GRANTED** and the case shall be dismissed from the Court's docket.

To all of which the Plaintiffs object and take exception.

Entered this 4 day of April, 2007



Judge John S. Hrko

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

CERTAIN UNDERWRITERS AT LLOYDS
OF LONDON, SUBSCRIBING TO POLICY
NO.:B0711,
PLAINTIFFS,

v.

Civil Action No.: 06-C-186

PINNOAK RESOURCES, LLC. and
PINNACLE CREEK MINING CO., LLC.,
DEFENDANTS.

ORDER

This matter came before the Court upon Plaintiff Certain Underwriters at Lloyds' Rule 56(e) Motion to alter or amend the Court's April 11, 2007 judgment. Hearing was held on this motion on Friday June 15, 2007. After hearing argument on the motion, reviewing the motion and response, review of the case file, review of the Court's previous order, and review of the relevant law in the State of West Virginia this Court declines to alter or amend it's previous judgment in this case.

ACCORDINGLY, it is hereby **ORDERED**, that the Plaintiffs Rule 56(e) motion to alter or amend the Court's April 11, 2007 judgment is and shall be **DENIED**.

To all of which the Plaintiffs object and take exception.

The clerk shall send copies of this order to the counsel of record at the following.

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Entered this 21 day of June, 2007

DAVID "BOB" STOVER, CLERK

This the 21 day of June, 2007

By: [Signature]

[Signature]
JUDGE JOHN S. HRKO