IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

THE BEDWELL COMPANY, SYNTERRA, LTD., CMLP, and TURNER CONSTRUCTION COMPANY, a/k/a SYNTERRA/TURNER, a Joint Venture, Plaintiffs,	:	November Term 2004
	:	No. 1328
v.	:	Commerce Program
D.ALLEN BROS., INC., HARLESYVILLE MUTUAL INSURANCE CO., and ELIZABETH STIER, Individually and as Administrator of the Estate of Charles Stier, LUMBERMANS MUTUAL CASUALTY CO. and KEMPER INSURANCE COMPANY, Defendants.	:	Control Numbers 031475/031434

ORDER

AND NOW, this 6th day of December 2006, upon consideration of Defendant Harleysville Mutual Insurance Company's Motion for Summary Judgment (cn 031475) and Plaintiffs' Motion for Summary Judgment (cn 031434), all responses in opposition, Memoranda, all matters of record and in accord with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** that said motions are **Granted in part and Denied in part** as follows:

1. Defendant Harleysville Mutual Insurance Company's ("Harleysville") Motion for Summary Judgment as it pertains to Harleysville's duty to defend The Bedwell Company ("Bedwell") is **granted** and Harleysville does not owe Bedwell a duty to defend for the Stier claim. Plaintiffs' Motion for Summary Judgment is this regard is **denied.**

2. Plaintiffs' Motion for Summary Judgment as it pertains to Defendant D. Allen Brothers duty to defend and indemnify Bedwell for the Stier claim is **granted** and D. Allen Brothers owes Bedwell a duty to defend and indemnify for the Stier claim.

3. All other aspects of the motions are **denied.**

BY THE COURT,

_____

HOWLAND W. ABRAMSON, J.

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	:	031475/031434
Defendants.	:	

OPINION

ABRAMSON, J.

This is a declaratory judgment action in which the parties seek a declaration concerning their rights and obligations to indemnification and reimbursement of defense costs incurred in an underlying suit captioned Stier v. The Bedwell Company, September Term 2003 No. 3316 ("the underlying action").[1] For the reasons stated below, the motions for summary judgment are granted in part and denied in part.

BACKGROUND

On or about December 14, 1998, Synterra Ltd. and Turner Construction Company a/k/a Synterra/Turner, a joint venture ("Synterra/Turner") entered into an agreement with the School District of Philadelphia to act as a construction manager/consultant for the

[1] Also pending is a Motion to Determine Preliminary Objections filed by Defendant Kemper/Lumberman's. The court will issue a separate order disposing of said motion.

construction of a new elementary school facility located at 4th Street and Lehigh Avenue ("The Project"). Synterra/Turner's obligations included bid preparation, contract coordination, scheduling, delivery of services, review of plans and inspection.

On April 24, 2000, the School District entered into a separate contract with The Bedwell Company ("Bedwell") to act as general contractor for the project. In accordance with the contract, Bedwell procured insurance with Manufacturer's Alliance Insurance Company ("PMA").[2]

On May 15, 2000, Bedwell entered into a subcontract with D. Allen Bros., Inc. ("Allen Brothers") to act as the masonary subcontractor for certain work on the project. In accordance with the subcontract, Allen Brothers procured insurance with Harleysville Mutual Insurance Company ("Harleysville"), as its primary insurer and with Lumbermans Mutual Casualty Co. and Kemper Insurance Company as its excess insurer. As part of the contract, Allen Brothers was required to perform all work and furnish all supervision, labor, materials, scaffolding, tools, equipment, supplies, safety apparatus, layout, surveys, shop drawings, engineering and all other things necessary for the construction and completion of the Subcontract work.

On September 26, 2001, while working on the project, Charles Stier, an employee of Allen Brothers, fell from a scaffold approximately 40 feet and died from his injuries. On September 23, 2003, the Stier Estate instituted a wrongful death action against Bedwell and Synterra/Turner. The Stier complaint alleged that Bedwell and

[2] PMA is also a Plaintiff in this matter asserting a claim for equitable subrogation.

Synterra/Turner failed to properly supervise Allen Brothers to ensure that it safely erected scaffolding and performed their job responsibilities.[3]

After receiving notice of the Stier claim, Bedwell and Synterra/Turner tendered their defenses to Allen Brothers and Harleysville. Harleysville rejected Synterra/Turner's request for coverage.[4] As it pertained to Bedwell, Harleysville agreed to defend Bedwell under a reservation of rights. Harleysville appointed counsel to represent Bedwell. Bedwell rejected the offer of defense and demanded the return of the Bedwell litigation file to PMA's attorneys for handling.

After filing motions for summary judgment which were denied, the underlying action proceeded to trial where it ultimately settled for $900,000.00 without any apportionment of liability between the defendants. PMA contributed $600,000.00 to the settlement and Harleysville contributed $300,000.00. PMA and Harleysville entered into a separate agreement in which the ultimate liability to pay the $900,000 would be determined by the instant case.

[3] Specifically, the Stier complaint alleged that Bedwell and Synterra/Turner were negligent by failing to inspect and monitor the condition of the scaffolding and other working platforms at the site to determine whether such scaffolding and/or platforms were equipped with proper and appropriate fall protection devices, failing to provide warnings and/or instructions to Stier and other workers at the job concerning hazardous conditions existing at the Project including lack of sufficient fall protection, failing to perform adequate investigation and monitoring of the Project to ensure compliance with applicable safety standards and failing to hire properly qualified and trained persons to act as safety engineers. (Stier complaint ¶20, 27, 34, 41, attached to Plts. Mt. for SJ as Exhibit "C").

[4] Harleysville claims that it communicated its initial reservation of rights letter prior to the filing of the Stier complaint in February 2003 and then on February 26, 2004.

DISCUSSION

Harleysville's Motion for Summary Judgment- Insurance Duty to Defend and Indemnify.

A. Bedwell Waived its Right to Recover Defense Costs for the Stier action.

A duty to defend clause in an insurance policy gives an insurer the right to control the insured's defense. An insured may reject a proffered defense if the defense offered is in breach of the insurers' obligations under the contract. In the case *sub judice,* Bedwell and PMA argue that Harleysville breached its obligation under the policy by issuing a reservation of rights letter and by failing to appoint conflict free counsel.

With respect to Bedwell's claim that Harleysville breached its duty under the policy by issuing a reservation of rights letter, the mere issuance of a reservation of rights letter does not constitute a breach of contract for which a defense may be rejected. [5] Under Pennsylvania law, the general rule is that an insurance company may not assume the defense of a suit which entails the defendant's relinquishing to the insurer the management of the case and then later deny liability under the policy. However, the insurer may protect its rights under the policy by timely issuing a reservation of rights which fairly informs the insured of the insurer's position. Merchants Mut. Ins. Co. v. Artis, 907 F. Supp. 886, 891 (E.D. Pa. 1995) (citation omitted); *see also* Aetna Life and Cas. Co. v. McCabe, 556 F. Supp. 1342, 1354 (E.D. Pa. 1983). In issuing the reservation of rights letter, the insurer is putting the insured on notice of what the insurer believes are its existing rights under the policy. The existence of a reservation of rights letter does not

[5] The reservations consisted of a determination that Bedwell was not an additional insured under the subcontract, Stier was not working for Allen Brothers at the time of the fall and Bedwell was not engaged in professional services. (Reservation of Rights Letter attached to Plts. Mt. for SJ as Exhibit "J").

automatically give rise to a conflict of interest between the insurer and the insured with regard to the conduct of the insured's defense. By virtue of the duty to defend the insurer is obligated to treat the insured's interests as its own. Accordingly, Bedwell's claim that Harleysville breached its obligation under the policy by issuing a reservation of rights letter is denied.

Additionally, Bedwell's claim that Harleysville breached its obligation under the policy by failing to provide conflict free representation suffers the same fate. When a liability insurer retains counsel to defend an insured, the insured is considered the client. If a conflict of interest arises between an insurer and its insured, the attorney representing the insured must act exclusively on behalf of and in the best interests of the insured. Rector, Wardens and Vestryman of St. Peter's Church v. Am. Nat'l Fire Ins. Co., 2002 U.S. Dist. LEXIS 625 (E.D. Pa. 2002)(*citing* Builders Square v. Saraco, 1996 U.S. Dist. LEXIS 19444 (E.D. Pa. Dec. 27, 1996)); *see also* Point Pleasant Canoe Rental, Inc. v. Tinicum Township, 110 F.R.D. 166, 170 (E.D. Pa. 1986)).

An insurance company breaches its duty to defend when conflict of interests arise between the insurer and its insured such that the company's pursuit of its own best interests in the litigation is incompatible with the best interests of the insured. St. Paul Fire & Marine Ins. Co. v. Roach Bros. Co., 639 F. Supp. 134, 138-39 (E.D. Pa. 1986). A conflict of interest between an insurer and its insured will not relieve an insurer of its duty to provide a defense. *See* Consolidated Rail Corp. v. Hartford Acc. & Indem. Co., 676 F. Supp. 82, 86 (E.D. Pa. 1987). Rather, courts have concluded that one appropriate resolution in this circumstance is for the insurer to obtain separate, independent counsel for each of its insureds, or to pay the costs incurred by an insured in hiring counsel. *See*

Rector, Wardens and Vestryman of St. Peter's Church v. Am. Nat'l Fire Ins. Co., 2002 U.S. Dist. LEXIS 625, 25-26 (D. Pa. 2002).

Bedwell's claim of inadequacy is grounded in Harleysville's refusal to defend Synterra/Turner. The right of an insurer to control the defense of a lawsuit is solely governed by the insurance policy. Harleysville, rightfully or wrongfully, determined that Synterra/Turner was not an additional insured under the policy and therefore refused to provide a defense. Harleysville's refusal to provide a defense to Synterra/Turner is not indicative that a conflict of interest existed between Harleysville and Bedwell. Bedwell and Synterra/Turner are separate entities and the refusal to provide a defense to one does not constitute sufficient evidence without more to find that Harleysville breached its obligations under the policy to Bedwell. Accordingly, Harleysville's Motion for Summary Judgment is granted. Plaintiffs' Motion for Summary Judgment is Denied. Bedwell is not entitled to recover defense costs for the Stier action.

B. A Genuine Issue of Material Fact Exists as to Whether Synterra/Turner is an Additional Insured Under the Harleysville Policy.

Allen Brothers purchased a primary insurance policy from Harleysville for claims made during the scope of the Project. The certificate of insurance identifies the following as additional insureds under the policy:

> …SCHOOL DISTRICT OF PHILADELPHIA, NEW ELEMENTARY SCHOOL 4TH ST. & LEHIGH AVE., PHILADELPHIA, PA., BEDWELL COMPANY AND THE SCHOOL DISTRICT OF PHILADELPHIA, ITS CONSULTANTS AND ARCHITECTS ARE INCLUDED AS ADDITIONAL INSUREDS

Since Synterra/Turner is the School District of Philadelphia's consultant, Synterra/Turner argues that it is an additional insured on the policy by virtue of its identification on the certificate of insurance. In this instance, the identification of an

entity on a certificate of insurance is not evidence that coverage exists for the entity as an additional insured. The specific certificate of insurance issued by Harleysville contains a disclaimer which states "the certificate was issued as a matter of information and confers **no rights** upon the certificate holder." (Plts. Mt. for SJ Exhibit "D")(emphasis added). Furthermore, the certificate of insurance states "it does not amend, extend or alter the coverage afforded by the policy." (Id.). Hence, it is the language of the underlying policy which governs Synterra/Turner's status as an additional insured.

The pertinent language concerning additional insureds is found in an endorsement and states:

> A. Section II-Who Is an Insured is amended to include as an insured any person or organization **for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy**. Such person is an additional insured only with respect to liability arising out of your ongoing operations performed for that insured**.** A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed….

Hence in order for Synterra/Turner to be considered an additional insured under the policy two requirements must be satisfied, 1) Allen Brothers must be performing work for Synterra/Turner and 2) Allen Brothers and Synterra/Turner must have agreed in writing to add Synterra/Turner as an additional insured. The Subcontract between Allen Brothers and Bedwell clearly requires Allen Brothers to name Synterra/Turner as an additional insured under the policy. (Exhibit "B" Plts. Mt. for SJ-Subcontract Art. 22.2; Article III, General Requirements.). However, Allen Brothers was not performing work for Synterra/Turner. Synterra/Turner is the School District's authorized representative on the project and was given various duties to perform for the School District such as scheduling, coordinating, inspecting and supervising. (See General Contract at Arts. GC

3B-GC-3D.). Thus, Allen Brothers was performing work for the School District and not Synterra/Turner. Pursuant to the policy definition of "who is an insured" Synterra/Turner should not be considered an additional insured because Allen Brothers was not performing work for Synterra/Turner. This conclusion however conflicts with the clear intent contained within the Subcontract which specifically required Synterra/Turner to be named as an additional insured under the policy. This also conflicts with the clear indication on the certificate of insurance where Synterra/Turner (Consultant) is identified as a additional insured. In light of this conflict, the court finds the provision defining who is an insured ambiguous. This ambiguity prevents the court from determining at this time whether Synterra/Turner is an additional insured under the policy. Accordingly, Harleysville and Plaintiffs' respective motions for summary judgment are denied.

C. Genuine Issues of Material Fact Exist as to Whether Harleysville owes Bedwell a Duty to Indemnify for the Settlement in the Stier Action.

Unlike the duty to defend, the duty to indemnify cannot be determined merely by on the basis of whether the factual allegations of the underlying complaint potentially state a claim against the insured. Rather there must be a determination that the insurer's policy actually covers the claimed incident. The duty to indemnify is separate and apart from the duty to defend carrying with its own measure of damages in the event of a breach.

Harleysville claims that it does not owe Bedwell indemnification for the underlying claim since Bedwell breached the Duty to Cooperate, breached the consent to settle clause and failed to seek apportionment of the settlement between the defendants thereby causing Bedwell to suffer actual prejudice. With respect to the duty to cooperate, in order to show that the insured breached the Duty to Cooperate, "the insurer must show that the breach is something more than a mere technical departure from the letter of the

[Policy. Instead, the insurer must show that the breach] is a [material variance] that results in substantial prejudice and injury to the insurer's position in the matter." Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 224-5, 140 A. 905, 907 (1928); Paxton Nat'l Ins. Co. v. Brickajlik, 513 Pa. 627, 630, 522 A.2d 531, 532 (1987) (same). *See* Forest City Grant Liberty Associates v. Genro II, Inc., 438 Pa. Super. 553, 559, 652 A.2d 948, 951 (1995)("a failure to cooperate must be substantial and will only serve as a defense where the insurer has suffered prejudice because of the breach".).

Where an insurer seeks to avoid liability for lack of cooperation, the question whether there has been a material breach is ordinarily for the jury. *See* Donaldson v. Farm Bureau Mut. Auto Ins. Co., 339 Pa. 106, 108, 14 A.2d 117, 118 (1940)("the question of lack of cooperation is ordinarily for the jury, especially when, as here, a finding of the insured's improper intent is necessary in order for the insurer to establish such a defense").

After reviewing the facts of record, the court finds that a material question of fact exists as to whether Harleysville suffered actual prejudice by Bedwell's alleged breach of the duty to cooperate, consent to settle and failure to apportion the settlement. [6]

II. Plaintiffs Motion for Summary Judgment- Contractual Indemnification.

A. The Clear and Unambiguous Indemnification Provisions Demonstrate that Allen Brothers intended to indemnify Bedwell for its negligence but not for the negligence of Synterra/Turner.

Plaintiff Bedwell bases its claim for indemnification against Allen Brothers on provisions contained within the Subcontract between Allen Brothers and Bedwell. Specifically, plaintiff argues that the clear and unequivocal language in the indemnification provision demonstrates that Allen Brothers intended to indemnify the

[6] The court also finds that the employer employee exclusion does not apply to preclude coverage for the Stier claim.

plaintiffs for the injuries sustained by Stier. Interpretation of the terms of the parties' written Subcontract, including its indemnification provisions, is a question of law for the court. *See* Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999). Indemnity agreements are to be narrowly interpreted in light of the parties' intentions as evidenced by the entire contract. To establish a right to indemnification where a case is resolved by settlement, the party must establish that the settlement was reasonable, that the underlying claim was valid against it, that the claim is within the coverage of the agreement, and that any counsel fees were reasonable. County of Del. v. J.P. Mascaro & Sons, Inc., 830 A.2d 587 (Pa. Super. 2003)(citing McClure v. Deerland Corp., 401 Pa. Super. 226, 585 A.2d 19 (Pa.Super. 1991)). In interpreting the scope of an indemnification clause, the court must consider the four corners of the document and its surrounding circumstances. Chester Upland School District v. Edward J. Meloney, Inc., 901 A.2d 1055 (Pa. Super. 2006).

The Perry-Ruzzi Rule in its simplest form holds "that a contract of indemnity against personal injury should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms." Perry v. Payne, 217 Pa. 252, 66 A.2d 553 (1907). "No inference from words of general import can establish such indemnification." Ruzzi v. Butler Petroleum Company, 527 Pa. 1, 588 A.2d 1(1991). Hence, in order for a duty of indemnification to exist under these circumstances, the parties must have expressly contracted for it.

The indemnity provision in the instant Subcontract states:

Article 34-SUBCONTRCTOR'S INDEMNIFICATION

34.1 Duty to Indemnify. To the fullest extent permitted by law, the Subcontractor shall at its sole cost and expense, fully defend, indemnify

> and hold harmless Bedwell and its officers, employees, agents, consultants and representatives from and against any and all claims, demands, damages, losses and expenses including, without limitations, any liquidated damages asserted against Bedwell, together with attorney's fees, directly or indirectly arising out of or resulting from any act or omission in the performance of the Work by the Subcontractor or any of its officers, employees, agents, subcontractors, regardless of whether or not Bedwell or any of its officers, employees, agents, consultants and representatives were negligent.

(Exhibit "B" to Plts. Mt. for SJ.).

The language in section 34.1 shows unequivocally that Allen Brothers assumed responsibility and liability for injuries to all persons, including its own employees in the event that Bedwell was negligent. Given this language, it is clear that a contractual duty to indemnify and pay defense costs for Bedwell in the Stier claim exists.

As it pertains to Allen Brother's contractual indemnity obligations to Synterra/Turner, the court finds that Allen Brothers never agreed to indemnify Synterra/ Turner for Synterra/Turner's negligence. Unlike Allen Brothers' clear and unequivocal assumption of liability of Bedwell's negligence in Article 34, no such provision exist for Synterra/ Turner.

Additionally, the court does not find that Allen Brothers agreed to indemnify Synterra/Turner by way of pass through indemnification. The Supreme Court recently held that

> …unless expressly stated, pass through indemnification clauses violate the long standing policy underlying the rule narrowly construing indemnification provisions. When the provision sought to be 'passed through' involves indemnification for acts of another party's negligence, the theory will not be applied unless the contract language is clear and specific. Sound public policy requires an unequivocally stated intention to be included in the subcontract for this particular type of provision to pass through from the general contract. The general language of a standard incorporation clause cannot trump the specific language of the subcontract, when the former supports indemnification for negligent acts

> but the latter is ambiguous regarding the circumstances under which indemnification will occur.

Bernotas v. Super Fresh Food Markets, 581 Pa. 12, 863 A.2d 478, 484 (2004). Here, there is no provision within the Subcontract which unequivocally and specifically passes Bedwell's duty to indemnify Synterra/Turner to Allen Brothers. Consequently, Allen Brothers does not have a duty to indemnify Synterra/Turner.

This however does not end the inquiry. The Subcontract also states:

> **Article 21- LIABILITY FOR DAMAGE AND PERSONAL INJURY**
>
> 21.3 Personal Injury and Death. If any person (including employees of the Sucontractor) suffers injury or death …as a result, in whole or in part, of Sucontractor's acts or omissions, whether or not involving the negligence of Subcontractor, its employees, agents, or lower-tier subcontractors, Subcontractor assumes the liability therefore and shall indemnify and hold harmless there from the Owner, and Bedwell and their agents, servants, employees and sureties. With respect to any action involving Subcontractor's acts or omissions, (1) Subcontractor shall at its own expense, defend Bedwell and all other indemnified parties, and (2) Subcontractor shall pay all costs and expenses, including attorney fees, of and satisfy all judgments entered against Bedwell and all other indemnified parties. Subcontractor's assumption of liability herein includes but is not limited to assumption of all liabilities on account of or in any way related to Subcontractor's work that Bedwell has assumed under the Contract Documents or under agreements with third parties who may be affected by construction of the Project.

(Exhibit "B" to Plts. Mt. for SJ.).

By this language Allen Brothers agreed to indemnify Synterra/Turner in the event that Stier's death was caused by Allen Brothers' acts or omissions, regardless of negligence. Based on the foregoing provision, a question of fact exists as to whether the Stier's death resulted from the performance of Allen Brothers' work. If the incident resulted solely from the performance of Allen Brothers' work, then Synterra/Turner is owed a duty of indemnification and payment of defense costs under the subcontract. If the incident resulted solely or in part from the negligence of Synterra/Turner then Allen

Brothers does not owe Synterra/Turner a duty to indemnify and payment of defense costs. Accordingly, Plaintiffs' Motion for Summary Judgment is denied in this regard.[7]

CONCLUSION

Based on the foregoing, this court finds that the respective motions for summary judgment are granted in part and denied in part as follows:

1. Defendant Harleysville Mutual Insurance Company's("Harleysville") Motion for Summary Judgment as it pertains to Harleysville's duty to defend The Bedwell Company ("Bedwell") is granted and Harleysville does not owe Bedwell a duty to defend for the Stier claim. Plaintiffs' Motion for Summary Judgment is this regard is denied.
2. Plaintiffs' Motion for Summary Judgment as it pertains to Defendant D. Allen Brothers duty to defend and indemnify Bedwell for the Stier claim is granted and D. Allen Brothers owed Bedwell a duty to defend and indemnify for the Stier claim.
3. All other aspects of the motions are denied since genuine issues of material fact exist prohibiting the entry of summary judgment.

BY THE COURT,

_____

HOWLAND W. ABRAMSON, J.

[7]Plaintiffs' remaining grounds for summary judgment, reasonableness of settlement and attorneys fees, are denied since genuine issues of material fact exist prohibiting the entry of summary judgment.