

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

THE PYRITES COMPANY, INC., : JANUARY TERM, 2003
 Plaintiff, : NO. 4514
 v. : (Commerce Program)

CENTURY INDEMNITY COMPANY, : Control Nos. 061196, 061197
CCI INSURANCE COMPANY,
INSURANCE COMPANY OF NORTH :
AMERICA, and
HOME INSURANCE COMPANY, :
 Defendants.

ORDER

AND NOW, this 30th day of August 2005, upon consideration of plaintiff's Motion to Strike New Matter and Motion for Partial Summary Judgment, defendants'¹ responses in opposition, the respective briefs, all other matters of record, and in accord with the Opinion being contemporaneously issued, it is **ORDERED** that:

1. The Motion for Summary Judgment is **Granted, in part**, and the existence and terms of the insurance policy documents contained in Exhibits "A" through "E" attached to the Motion for Summary Judgment are deemed admitted by defendants.

2. The remainder of the Motion for Summary Judgment is **DENIED** without prejudice to be resubmitted if plaintiff can proffer evidence that it incurred costs relating to environmental contamination caused by an entity other than itself with respect to the Halby Site.

¹ Defendant Home Insurance Company did not respond, since the Motions were not directed to it.

3. The Motion to Strike is **Denied** without prejudice to plaintiff's right to claim that defendants have waived, or are otherwise estopped from asserting any particular defense upon which they actually rely to deny or limit coverage.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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

THE PYRITES COMPANY, INC., : JANUARY TERM, 2003
Plaintiff, : NO. 4514
v. : (Commerce Program)
CENTURY INDEMNITY COMPANY, : Control Nos. 061196, 061197
CCI INSURANCE COMPANY,
INSURANCE COMPANY OF NORTH :
AMERICA, and
HOME INSURANCE COMPANY, :
Defendants.

.....
OPINION

Albert W. Sheppard, Jr., J. August 30, 2005

Plaintiff, The Pyrites Company, Inc. (“Pyrites”), brought this action against its insurer, Insurance Company of North America, and certain of its successors in interest, CCI Insurance Company and Century Indemnity Company (collectively “INA”), for coverage related to certain costs and fees that Pyrites has incurred and/or will incur in connection with the clean-up of environmental contamination at two sites located in Delaware, commonly know as the Potts Site and the Halby Site.

Pyrites owned and operated a metal extraction facility on the Potts Site in the late 1960s and early 1970s. Pyrites also owned a portion of the Halby Site, including what is known as the Lagoon, for certain years during that period. From 1969-1974, at the least, Pyrites claims to

have been insured by INA under certain comprehensive general liability policies (the “Policies”) that allegedly provide coverage for some, if not all, of the costs Pyrites has incurred and will incur with respect to the clean-up of the Halby and Potts Sites.

Pyrites claims that it provided notice to INA of the Halby Site and Potts Site environmental claims in 1991 and 1993, respectively, but that INA refused to provide a defense or indemnification under the Policies. As a result, Pyrites asserts claims for breach of contract, bad faith, and breach of fiduciary duty. Pyrites has moved for partial summary judgment as to: (a) the existence and terms of the Policies, and (b) the number of covered occurrences that Pyrites may claim under the Policies

I. The Existence and Terms of the Policies Are Deemed Admitted.

Pyrites argues that there is no longer any dispute as to certain of the Policies that INA issued to Pyrites because, in response to Pyrites’ Requests for Admission, INA admitted that it issued the following Policies to Pyrites: CGL 241856; GLP 160761; GLP 335866; and GLP 419771. *See* Conley Affidavit,¹ Ex. N., pp. 4-6. Further, in its Motion for Summary Judgment (“MSJ”) Pyrites contends that:

[i]n its responses to written discovery, INA identified documents that it concedes are evidence of the INA Policies. Those documents are attached as Exhibits “A” through “E” of the Conley Affidavit. The documents include the declaration pages for each policy, the insuring agreements, and establish the terms and existence of the INA Policies.

See MSJ, ¶ 43 (hereinafter “Paragraph 43”).²

¹ The Exhibits in support of the Motion for Partial Summary Judgment are all attached to the Affidavit of Michael Conley, Esquire (“Conley Affidavit”).

² The documents referred to indicate the following: Policy CGL 241856 covered the period from February 1, 1966 to February 1, 1969; Policy GLP 160761 covered the period from February 1, 1969 to February 1, 1972; Policy GLP 335866 covered the period from February 1, 1972 to February 1, 1973; and Policy GLP 419771 covered the period from February 1, 1973 to February 1, 1974.

In its Response to Pyrites' Motion, INA states only that "[n]o response is required as [Paragraph 43] states legal argument." Response to MSJ, ¶ 43. But, because Paragraph 43 contains factual averments rather than just legal conclusions, INA's response is, at best, non-responsive. In refusing to address the facts asserted by Pyrites in Paragraph 43, INA has failed to "identif[y] one or more issues of fact arising from evidence of record controverting" the facts and documents referenced in Paragraph 43. *See* Pa. R. Civ. P. 1035.3. Therefore, summary judgment may properly be entered against INA on this issue.

INA argues that "among other things, it is not clear that those documents [referenced in Paragraph 43] are complete copies of the Policies; [INA] should have the opportunity to confirm whether they are or, in the alternative, consider whether to stipulate to the pertinent terms and conditions." Brief in Opposition to MSJ, pp 7-8. However, INA's argument that it should be entitled to more time to establish the accuracy and veracity of the proffered documents is not persuasive in that it produced the documents in discovery. In doing so, INA identified them as being pertinent to the Policies. *See id.*, Ex. A. Further, since notice of the underlying claims was provided to INA in or before 1993, INA has had more than ten years to discover any missing portions of the Policies. Because INA has proffered no evidence that the documents referenced in Paragraph 43 do not set forth at least some of the terms of the Policies, they should be deemed admitted.

II. The Court Cannot Presently Determine The Number of Occurrences.

Pyrites asks this court to rule that its liability to pay for the cleanup of the Potts Site, a portion of the Halby Site, and the Halby Lagoon constitute three separate occurrences under the Policies.

The general rule is that an occurrence is determined by the cause or causes of the resulting injury. The majority of jurisdictions employ the 'cause theory'. Using

this analysis, the court asks if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.

Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982); D'Auria v. Zurich Ins. Co., 352 Pa. Super. 231, 237, 507 A.2d 857, 861 (1986). Under this reasoning, the fact that there were multiple polluted sites does not mean that there were multiple occurrences under the Policies. However, if there were several causes of the pollution at those sites, and Pyrites incurred costs associated with more than one cause, then there would be more than one occurrence for which Pyrites is entitled to coverage under the Policies.

Pyrites urges that there are three causes of the pollution at the Sites. With respect to the Potts Site, Pyrites admits that the contamination was caused by Pyrites' metal extraction processes on that site. *See* MSJ, ¶¶ 49-50. With respect to the Halby Site, Pyrites claims that some of the contamination was caused by Pyrites' storage of pyrite ore on a portion of the site, but that the contamination of the Lagoon was caused by another entity's manufacturing processes at Halby. *See id.* ¶¶ 52-53, 56-57.

Pyrites' storage of pyrite ore at the Halby Site was necessarily connected with Pyrites' metal extraction operations on the Potts Site, so the two activities constitute one proximate polluting cause. *See* Conley Affidavit, Ex. P, pp 10-11; Complaint, ¶ 15. Therefore, if Pyrites incurred liability for the contamination that it caused on the Potts and Halby Sites due solely to these two related activities, then there was only one occurrence under the Policies. However, if Pyrites was also held liable, in part, for the contamination that some other entity caused to the Halby Site or the Lagoon, then Pyrites may claim that those damages were caused by a separate occurrence.

Unfortunately, an analysis of the facts of record is insufficient, at this juncture, for the court to determine if certain damages at the Halby Site were incurred by Pyrites or not. Accordingly, the court will deny this Motion without prejudice to be resubmitted if evidence can be presented to demonstrate that a separate cause (e.g., another entity) was involved.

CONCLUSION

For these reasons, plaintiff's Motion for Partial Summary Judgment is granted, in part. The court will enter an Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.