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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION Civil Action No. 16-C-7000

THIS DOCUMENT APPLIES TO:

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC.,

Plaintiff,

Civil Action No.: 15-C-1022 KAN

v.

TRIAD ENGINEERING, INC. et al.,

Defendants.

ORDER REGARDING DEFENDANT NEW HAMPSHIRE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

The Presiding Judges have reviewed and maturely considered all of the submissions of the parties, and heard oral argument from counsel in support of and in opposition to *Defendant New Hampshire Insurance Company's Motion for Summary Judgment* (Transaction ID 60374382). Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously make the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**:

FINDINGS OF FACT

1. This case involves issues related to the design and construction of a runway extension project at Yeager Airport in Charleston, West Virginia.
2. Yeager Airport sits on a man-made plateau constructed by removing portions of the ridge and hilltops. Second Amended Complaint, ¶24.
3. Plaintiff Central West Virginia Regional Airport Authority, Inc. (the "Airport Authority") contends that, in or about 2003, it decided to provide a Runway Safety Area ("RSA") for its

runways, including Runway 5-23, which is the subject of this civil action. This required an extension of the runway's southernmost end, using an engineered material arresting system ("EMAS") made of "specialized air-entrained cement blocks" at the end of the runway, which are meant to collapse under the weight of an airplane, stopping its progress and preventing a crash. *Id.*, ¶¶25-26.

4. To support the extension of Runway 5-23 past the end of the existing plateau, "[f]ill and other materials would have to be brought in to construct a mechanically stabilized earth structure ("MSE") or man-made slope so the extension could be built at the same elevation as the existing runway. The plan called for movement of approximately 750,000 cubic yards of earth." *Id.*, ¶¶27-28.
5. The Airport Authority asserts the total cost for the extensions to both runways was more than $30 million dollars, and describes the process as "dramatically altering the natural grade of the land." *Id.*, ¶¶27-28.
6. The Airport Authority contends "the Runway 5-23 EMAS and MSE area catastrophically failed, sending hundreds of thousands of cubic yards of fill and other material cascading down" on March 12, 2015. *Id.*, ¶38.
7. Defendant New Hampshire Insurance Company ("NHIC") was the Airport Authority's property insurer. *Id.*, ¶98.
8. The Airport Authority now seeks a "declaratory judgment against [NHIC] to the effect that any and all applicable policies issued by [NHIC] to the plaintiff provide coverage to the plaintiff for any and all first party claims brought by the plaintiff for damages to its own property and infrastructure related in any manner to this catastrophic event, and that no

exclusions, including but not limited to, landslide exclusions, apply to any first party claim." Id., ¶99.

9. The NHIC Policy (the Policy) at issue is Policy Number 01-LX-067043631-0/000. The Policy Period is November 3, 2014, to November 3, 2015.

10. The Policy insures Plaintiff against damage to "Covered Property." It provides:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Covered Property

Covered Property as used in this Coverage Part, means the type of property described in this Section **A.1.**, and limited in **A.2.**, Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

a. Building, meaning the building or structure described in the Declarations, including:
(1) Completed additions;
(2) Fixtures, including outdoor fixtures;
(3) Permanently installed:
(a) Machinery and
(b) Equipment.
(4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:
(a) Fire extinguishing equipment;
(b) Outdoor furniture;
(c) Floor coverings; and
(d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
(5) If not covered by other insurance:
(a) Additions under construction, alterations and repairs to the building or structure;
(b) Materials, equipment, supplies and temporary structures, on or within 1,000 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within 1,000 feet of the described premises, consisting of the following unless otherwise specified in the Declarations or on the Your Business Personal Property – Separation of Coverage form:
(1) Furniture and fixtures;
(2) Machinery and equipment;
(3) "Stock";
(4) All other personal property owned by you and used in your business;
(5) Labor, materials or services furnished or arranged by you on personal property of others;
(6) Your use interest as tenant in improvements and betterments.
Improvements and betterments are fixtures, alterations, installations or additions:
(a) Made a part of the building or structure you occupy but do not own; and
(b) You acquired or made at your expense but cannot legally remove;
(7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

c. Personal Property of Others…

Building and Personal Property Coverage Form, page 1 of 18.

11. The Policy also provides that certain types of property are not covered:

2. Property Not Covered

Covered Property does not include:
***
d. Bridges, roadways, walks, patios or other paved surfaces;
***
f. The cost of excavations, grading, backfilling or filling;
***
h. Land (including land on which the property is located), water, growing crops or lawns;

Id., page 2 of 18.

12. The Policy is written on an "agreed value" basis, under which all insured Buildings and Personal Property are insured at a total combined value of $74,964,138. *Id.*, Declarations, page 10 of 18.

13. There are thirteen specific buildings listed in the Policy's Declarations, numbered Building 1 through Building 13. Buildings 1 through 11 are specifically identified, named, and valued in the Declarations as follows:

Building	**Building Name**	**Insured Building Value**
1	Terminal	$37,745,365
2	SS Building	707,418
3	FAA Building	3,172,292
4	Maintenance/Snowplow	412,282
5	Maintenance/Service Garage	580,287
6	Warehouse/Storage	167,944
7	Parking Garage	27,842,219
8	Rental Car Svc	986,183
9	Cap Bldg	109,402
10	Cap Bldg #2	437,323
11	105 Keystone Drive	114,000

Id., Declarations, pages 2 through 9 of 18. Buildings 12 and 13 are specifically identified, named, and valued added by Endorsement as follows:

12	301 Eagle Mt. Road	125,000
13	301 Eagle Mt. Road Salt Storage Bldg.	25,000

Id., General Change Endorsements. The total insured value of the thirteen numbered buildings is $72,424,715. The Airport Authority's $30 million runway extensions are not listed. [1]

14. The Policy also lists 41 items of the Airport Authority's insured equipment individually, from a $465,000 Oshkosh HB2723 snow blower to a $2,000 Taylor Dunn R386 electric cart, with piece of equipment's model number and dollar value. *Id.*, Declarations, pages 14 and 16 of 18. The Airport Authority's insured equipment is valued at $2,351,021. Again, the $30 million runway extensions are not listed.

15. The runway extension the Airport Authority asserts catastrophically failed on March 12, 2015, is not part of the $74.9 million of property the Airport Authority sought to insure and NHIC agreed to insure.

CONCLUSIONS OF LAW

The "[l]anguage in an insurance policy should be given its plain, ordinary meaning." Syl. pt. 1, *Municipal Mut. Ins. Co. of West Virginia v. Hundley*, 228 W. Va. 573, 576, 723 S.E.2d 398 (2011)(Per Curiam)(internal citations omitted). "Where the provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Id.*, Syl. pt. 2. An insurance contract "must be considered as a whole, effect being given, if possible, to all parts of the instrument." *Id.*, Syl. pt. 3.

"The determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. pt. 1, *American States Ins. Co. v. Surbaugh*, 231 W. Va.

[1] In addition to being listed in the Declarations, these building values were submitted to NHIC by the Airport Authority when it applied for insurance from NHIC. October 7, 2014, email from Seltzer Insurance Agency to NIP group.

288, 294, 745 S.E.2d 129 (2013)(internal citation omitted). Furthermore, "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination." *Id.*, 231 W.Va. 292. However, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous." *Id.*, 231 W. Va. 295, *citing* Syl. pt. 1, *Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W.Va. 252, 162 S.E.2d 189 (1968).

"Only if the court makes the determination that the contract cannot be given a certain and definite legal meaning, and is therefore ambiguous, can a question of *fact* be submitted to the jury as to the meaning of the contract." *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995). That being said, "a court should read policy provisions to avoid ambiguities and not torture the language to create them. 'If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue.'" *Id., citing Williams v. Precision Coil, Inc.*, 194 W.Va. at 66 n. 26, 459 S.E.3d at 343 n. 26, *quoting Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1126 (4th Cir. 1993).

The Court concludes the Policy is unambiguous. Therefore, whether there is coverage under the Policy is properly before the Court to be determined as a matter of law. The Policy states that,

> We will pay for direct physical loss of or damage to Covered Property at the premises *described in the Declarations* caused by or resulting from any Covered Cause of Loss.

Building and Personal Property Coverage Form, page 1 of 18 (emphasis added). "Covered Property," is defined in the Policy as "the type of property described in this Section **A.1.**, and

limited in **A.2.**, Property Not Covered, *if a Limit of Insurance is shown in the Declarations for that type of property*." *Id.* (emphasis added)

"Covered Property," as defined in the Policy, and specifically identified in the Policy's Declarations and Endorsements, is unambiguous and does not include the runway extension, for which the Airport Authority seeks coverage. The lack of insurance coverage for the runway extension is clearly demonstrated in the Policy Declarations and Endorsements, which list 13 buildings with Limits of Insurance totaling $72,424,715, plus 41 specific items of airport equipment valued at $2,351,021, which is close to the Policy's $74.9 million property coverage limit. The runway extension that failed on March 12, 2015, is not described in the Policy Declarations, nor is there a Limit of Insurance shown in the Declarations for the runway extension. Consequently, the runway extension it is not "Covered Property" under the Policy.

The Airport Authority contends the runway extension is "Covered Property" under the Policy because it falls within the definition of a "Building" or "Your Business Personal Property" under the Policy. Resp., p. 4. The Airport asserts, "Building" is defined in the Policy as "the building or structure described in the Declarations, including: (1) Completed additions; [and] (2) Fixtures, including outdoor fixtures. . . ." Because the runway extension is a "Completed addition" or "a fixture" the Airport Authority contends it is a "Building" under the Policy.

The Court finds this argument unpersuasive for two reasons. First and foremost, the Policy insures only a building or structure *described in the Declarations*. The Declarations specifically identify 13 individual buildings, including each building's location and Limit of Insurance or insured value. For example, the Declarations identify Building No. 1 as the Terminal, with a Limit of Insurance of $37,745,365. Likewise, Building No. 5, the building the

Airport Authority contends is closest to the runway extension, is the Maintenance/Service Garage, with a Limit of Insurance of $580,287. Because the runway extension is not a building or structure described in the Declarations, with a Limit of Insurance, as required by the Policy, it is not "Covered Property." See Building and Personal Property Coverage Form, page 1 of 18

Second, the runway extension is not an "addition" or a "fixture" to any of the buildings identified in the Policy Declarations. There is no connection between the runway extension and the buildings described in the Policy's Declarations such that the runway extension would be considered an "addition" to the building. The runway extension is not functionally part of any of the buildings described in the Declarations. See Pilgrim Laundry & Dry Cleaning Co. v. Federal Ins. Co., 140 F.2d 191, 194 (4th Cir. (W.Va.) 1944)(smaller building containing steam boilers and generators for laundry was not an "addition" for insurance coverage purposes because it was not functionally part of the larger building – the connections between them were "merely casual").

According to 2 Couch on Insurance § 20:29:

> An insurance policy may, by express terms, include connected buildings, structures, additions, or extensions. Indeed, such general terms as "building," "structure," "factory," "warehouse," and the like may, by implication, include other buildings or structures *so connected with a main building as to be actually a part thereof*. Such is the case with buildings devoted to particular uses where it is evident that connected structures, additions, and extensions are *necessary adjuncts to the main building* and therefore contemplated as included in the description as a part of the property insured. Furthermore, the terms "additions," "extensions," and appurtenant structures are not confined to buildings or structures physically annexed or connected but *may include a building wholly disconnected from the main building provided that both are used as part of a common enterprise.* The question turns on the relative location of the buildings, their accessibility, and adaptability to some common end so that each case must be determined from its own peculiar facts.

Based on the above discussion, the runway extension is not an addition to any of the buildings described in the Policy Declarations: (1) it is not so connected with any of the buildings described in the Policy Declarations as to be actually a part of the building; (2) it is not a necessary adjunct to any of the buildings described in the Policy Declarations; and (3) it is not part of a common enterprise with any of the buildings described in the Policy Declarations.

Additionally, the runway extension is not a "fixture" to one of the buildings described in the Policy Declarations. Black's Law Dictionary defines the term "fixture" as,

> Personal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home. *See* UCC § 9-102(a)(41).

Black's Law Dictionary (9th Ed.), p. 713. Similarly, in Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co., 43 A.D.3d 23, 33, 836 N.Y.S.2d 99, 106 (N.Y. App. Div. 2007), a case cited by the Airport Authority, the court held that paving and fences attached to the roof of the garage were "outdoor fixtures" under the policy, and were covered property because the policy insured property "actually affixed to the roof of the garage." *Id.* Items not attached to the garage, were not covered property. *Id.* The runway extension at issue is just that – an extension of Runway 5-23. It is not attached to any of the buildings described in the Policy Declarations. Thus, it is not a "fixture" to any of the buildings described in the Policy Declarations.

The Airport Authority also contends the runway extension falls within the definition of "Your Business Personal Property" which constitutes "Covered Property" under the Policy because it is located "within 1,000 feet of the described premises, consisting of the following . . .: (1) Furniture and fixtures . . . ." Building and Personal Property Coverage Form, page 1 of 18. The Airport Authority asserts the runway extension is within 1000 feet of Building No. 5, the Maintenance/Service Garage described in the Policy Declarations, and for the same reason the

runway extension constitutes a fixture under the Building definition it constitutes a fixture under this provision of the Policy. The Court finds this argument equally unavailing. The runway extension is clearly not attached to Building No. 5, the Maintenance/Service Garage described in the Policy Declarations, whether or not the runway extension is located within 1,000 feet of Building No. 5. Thus, it does not fall within the definition of "Your Business Personal Property" under the Policy.

The property for which the Airport Authority seeks coverage is also classified as "Property Not Covered" under the Policy, that being "The cost of excavations, grading, backfilling, or filling," and "land." Building and Personal Property Coverage Form, page 2 of 18. The Airport Authority describes this property in its Second Amended Complaint as a "mechanically stabilized earth structure," created by moving 750,000 cubic yards of "earth." (¶¶27-28). The Airport Authority describes the earth beneath Runway 5-23 as "the land." (¶27).

There is no West Virginia authority limiting "land" exclusions to undisturbed land. Furthermore, land exclusions have been applied in other states, to include damage to developed land. E.g., Sioux City Country Club v. Cincinnati Ins., Co., No. C03-4071-PAZ, 2004 WL 1559705 (N.D. Iowa June 22, 2004)(graded slope); Soundview Assoc. v. New Hampshire Ins. Co., 215 A.D.2d 370, 625 N.Y.S.2d 659 (2nd Dep't 1995)(greens and fairways of golf course were "land"); B.S.C. Holding, Inc. v Lexington Ins. Co., 11-CV-2252, 2014 WL 2207966, at *9 (D. Kan. May 28, 2014), aff'd, 625 Fed. Appx. 906 (10th Cir. 2015)(mine, consisting of "land, excavations, underground passageways, shafts, slopes, [and] tunnels.").

The damage claimed by the Airport Authority involves primarily the cost of excavations, grading, backfilling, and filling, which is not Covered Property. The runway extension at issue was created by grading and filling the existing plateau. The Airport Authority describes the

construction of the Mechanically Stabilized Earth structure or "MSE" which supports the runway extension as "dramatically altering the natural grade of the land." Id., ¶27. The Airport Authority further describes the construction process as bringing in "fill and other materials…to construct a mechanically stabilized earth structure or manmade slope." Id., ¶28. According to the Airport Authority's own description, the MSE was created by grading and filling the existing land.

Because the Court has determined as a matter of law that the runway extension, including the EMAS and MSE are not covered under the Policy, the Court does not address the application of the Policy's "Earth Movement" and "Faulty Workmanship" exclusions.

"Summary judgment is warranted if the available evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. C. P. Rule 56; Jochum v. Waste Management of West Virginia, Inc., 224 W. Va. 44, 48, 680 S.E.2d 59 (2009). A party claiming that additional discovery is required before summary judgment may be entered must make "a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion." Rule 56(f); Pingley v. Huttonsville Pub. Serv. Dist., 225 W.Va. 205, 210-11, 691 S.E.2d 531, 536-7 (2010). That good-faith affidavit must "explain why further discovery is necessary" because it has had "an inadequate opportunity to conduct discovery." Id., 691 S.E.2d at 534. Here, the Plaintiff has submitted no such good-faith affidavit and has not otherwise shown why further discovery is necessary or what facts are needed and are not available to it.

The evidence submitted by NHIC demonstrates that there is no genuine issue of material fact, and that NHIC is entitled to judgment as a matter of law regarding Count XIII of the Second Amended Complaint. The Panel **ORDERS** that judgment be entered in favor of NHIC regarding

Count XIII of the Second Amended Complaint, and that Count XIII of the Second Amended Complaint is **DISMISSED** with prejudice and without costs. This Order applies solely to the issues in contention between NHIC and Plaintiff, and has no effect on any issue disputed between the other parties to this matter. The Parties' exceptions and objections are noted and preserved for the record.

The Court **FINDS** upon **EXPRESS DETERMINATION** that this is a final order available for the proper application of the appellate process pursuant to Rule 54(b) of the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review. The parties are hereby advised: (1) that this is a final order; (2) that any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) that a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

It is so **ORDERED**.

ENTER: May 10, 2018.

/s/ John A. Hutchison
Lead Presiding Judge
Yeager Airport Litigation