

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

BLACK & VEATCH CORPORATION,

Respondent

v.

WELLINGTON SYNDICATE AND CONTINENTAL CASUALTY COMPANY.

Appellant

DOCKET NUMBER WD69286

DATE: October 27, 2009

Appeal From:

Circuit Court of Johnson County, MO
The Honorable Joseph Paul Dandurand, Judge

Appellate Judges:

Division **Three**
Thomas H. Newton, C.J., James Edward Welsh, and Karen King Mitchell, JJ.

Attorneys:

Kirk T. May, Kansas City, MO
Susan F. Robertson, Kansas City, MO

Counsel for Appellant, Wellington
Counsel for Appellant, Continental

Attorneys:

Roy C. Bash, Kansas City, MO

Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**BLACK & VEATCH CORPORATION, Respondent, v.
WELLINGTON SYNDICATE AND CONTINENTAL
CASUALTY COMPANY, Appellant**

WD69286

Johnson County

Before Division Three Judges: Newton, C.J., Welsh, and Mitchell, JJ.

This appeal involves a contract dispute between Black & Veatch Corporation and Wellington Syndicate and Continental Casualty Company (Builder's Risk Insurers) about a policy of insurance. The primary issue is whether or not the insurance policy provides coverage for losses arising out of ocean transit. The circuit court granted summary judgment for Black & Veatch on the coverage issue and found that the policy covered losses arising out of ocean transit. A bench trial occurred on the Builder's Risk Insurers' request for reformation, and the circuit court found against the Builder's Risk Insurers. A jury trial occurred on Black & Veatch's claim for damages, and the jury awarded Black & Veatch \$23,072,979 in damages. The jury also found that no set-off was justified even though Black & Veatch had received \$35 million in settlement payments from its ocean marine insurer (Hiscox) and from the manufacturer of the property lost in ocean transit (Toshiba). The Builder's Risk Insurers appeal, asserting eleven separate points. These eleven points, however, concern three basic areas: (1) coverage issues, (2) reformation issues, and (3) damages and set-off issues.

AFFIRMED.

Division Three holds:

(1) The plain language of the policy unambiguously provides "worldwide," "all risk" coverage, without exclusion for ocean transit of covered property. The circuit court, therefore, did not err in concluding that coverage existed for the losses incurred by the ocean transit of the property and properly granted summary judgment in favor of Black & Veatch.

(2) Because the policy in this case is unambiguous, we do not consider extrinsic or parol evidence. The circuit court, therefore, did not err in entering summary judgment in favor of Black & Veatch on the issue of coverage.

(3) After the circuit court determined on summary judgment that the policy unambiguously provided coverage and after the circuit court denied the insurers' request for reformation in a bench trial, the only issue that remained to be adjudicated at the jury trial was the issue of damages. There was nothing to submit to the jury at the damage trial on the issue of coverage, other than the fact that the circuit court had found coverage under the policy. The circuit court, therefore, properly denied the Builder's Risk Insurers' motion for directed verdict or for judgment notwithstanding the verdict regarding the policy coverage issue.

(4) The Builder's Risk Insurers did not establish by clear, cogent, and convincing evidence that a preexisting agreement existed between the parties concerning an exclusion for

ocean transit losses, that a mistake existed in the policy as written, or that the parties to the agreement acted under a mutual mistake. Reformation, therefore, was unwarranted under the circumstances. The circuit court, therefore, did not err in denying the Builder's Risk Insurers' counterclaim for reformation.

(5) The Builder's Risk Insurers bore the burden to establish all elements of their set-off defense, including whether Black & Veatch was paid by Hiscox and Toshiba for some or all of the same damages as awarded Black & Veatch in this action. Black & Veatch did not have a duty to allocate the \$35.2 million it received from Hiscox and Toshiba between the delay damages that Black & Veatch was seeking to recover from the Builder's Risk Insurers and the other damages Black & Veatch sought against Hiscox and Toshiba. The circuit court, therefore, did not err in denying the Builder's Risk Insurers' motions for directed verdict and for judgment notwithstanding the verdict.

(6) The Builders' Risk Insurers did not carry their burden in establishing that the \$35.2 million that Black & Veatch received from Hiscox and Toshiba was for the same delay damages which Black & Veatch sought to recover from the Builder's Risk Insurers. The jury was not obligated to believe the Builders' Risk Insurers' evidence. The circuit court, therefore, did not err in denying the Builder's Risk Insurers' motions for directed verdict and motion for judgment notwithstanding the verdict.

(7) The Builder's Risk Insurers had the burden of proof on their affirmative defense of set-off, and the jury was free to believe or disbelieve all, part, or none of the Builder's Risk Insurers' evidence and witnesses. The evidence presented by the Builder's Risk Insurers did not make it legally conclusive that the Builder's Risk Insurers were entitled to some set-off. The jury, therefore, was free to find against the party having the burden of proof, i.e. the Builder's Risk Insurers, and the jury's verdict in favor of the party not bearing the burden of proof, i.e. Black & Veatch, did not have to be supported by any evidence. The circuit court, therefore, did not err in denying the Builder's Risk Insurers' motion for new trial on this ground.

(8) The circuit court's decision refusing to bifurcate the trial was well within its sound discretion and does not shock our sense of justice. The circuit court, therefore, did not err in denying the Builder's Risk Insurers' request to bifurcate the trial and their motion for new trial on this ground.

(9) The "expediting expenses" provision does not restrict recoverable costs to merely making repairs or replacing damaged property. Substantial evidence existed to support the alternative disjunctive submission of "expediting expenses." The circuit court, therefore, did not err in overruling the Builder's Risk Insurers' objections to the verdict director, in refusing the Builder's Risk Insurers' withdrawal instruction, or in denying the Builder's Risk Insurers' motion for new trial based upon the alleged instructional error.

(10) The circuit court correctly did not allow the Builder's Risk Insurers to argue during closing argument that Black and Veatch had the burden of proof on the cost of capital claim that it asserted in opposition to the Builder's Risk Insurers' set-off claim. Black & Veatch had no such burden. The circuit court, therefore, did not abuse its discretion in sustaining Black & Veatch's objection to the Builder's Risk Insurers' closing argument and did not abuse its discretion in denying the Builder's Risk Insurers' motion for new trial on this ground.

(11) The Builder's Risk Insurers bore the burden of proof on its claim for set-off, including whether Black & Veatch recovered money from MEP Pleasant Hill, LLC (MEP) that was for the same elements of damages as claimed in this case. The jury was not obligated to believe the Builder's Risk Insurers evidence that the six million dollars that Black & Veatch received from MEP was for the same delay damages which Black & Veatch sought to recover from the Builder's Risk Insurers. The Builder's Risk Insurers did not meet their burden of proof. The circuit court, therefore, did not err in denying the Builder's Risk Insurer's request for a set-off of six million dollars.

Opinion by: James Edward Welsh, Judge

October 27, 2009

* * * * *

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITE