

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL COURT
(City of St. Louis)

FILED
APR 15 2015

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

WEST END DIVING AND SALVAGE)
CO.,)
)
Plaintiff,)
)
v.)
)
CERTAIN UNDERWRITERS AT LLOYD'S)
)
Defendant)

Cause No. 1322-CC09772

Division No. 11

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its Petition, Plaintiff West End Diving and Salvage Company brings claims to recover damages and penalties against the Defendant Certain Underwriters at Lloyd's. West End Diving and Salvage had entered into a building and personal property coverage contract with Certain Underwriters at Lloyd's for property which West End Diving and Salvage owned in Bonne Terre, Missouri, called The Depot. West End Diving and Salvage contends that a wind storm in Bonne Terre damaged The Depot on October 27, 2010, that West End Diving and Salvage's insurance policy with Certain Underwriters at Lloyd's was in effect at the time, that West End Diving and Salvage filed a claim for damages to cover the cost of the repairs required to The Depot building, that West End Diving and Salvage worked through the claim process with Certain Underwriters at Lloyd's, that Certain Underwriters initially offered to pay for repairs to The Depot but then denied coverage, that West End Diving and Salvage then went through the appraisal process which resulted in an agreed-upon damage amount of \$112,594.86 worked out by two appraisers, that Certain Underwriters at Lloyd's then sent a check to West End Diving and Salvage in the amount of \$87,061.55 without explanation of how

this amount was determined, that West End Diving and Salvage accepted this check as a partial payment of its claim and that Certain Underwriters of Lloyd's refused to make any further payments for repair of the damages at The Depot. West End Diving and Salvage Company claims that Certain Underwriters at Lloyd's initial failure to pay any part of the claim and then its refusal to pay the full amount of the claim constitutes vexatious delay on the part of the insurer which entitles West End Diving and Salvage to collect a penalty amount along with its attorney's fees.

Certain Underwriters at Lloyd's filed its answer denying liability for all of West End Diving and Salvage's claims and asserting a number of affirmative defenses to West End Diving and Salvage's claims.

On April 13, 2015, the parties appeared in Division 11 of the St. Louis City Circuit Court. They waived a jury and agreed to try the case to the Court. The Court has considered the pleadings, the testimony, the exhibits, and other evidence presented by the parties. Pursuant to Rule 73.01 of the Missouri Rules of Civil Procedure and based on the evidence and the law, the Court enters its findings of fact, conclusions of law and orders as follows:

PROCEDURAL BACKGROUND

1. On October 29, 2013, West End Diving and Salvage Company filed a petition in Cause No. 1322-CC09772. The Petition set out one count seeking to recover the balance due under its insurance policy with Certain Underwriters at Lloyd's for damages caused by a wind storm that struck The Depot on October 27, 2010, and also seeking damages under Missouri's Vexatious Refusal to Pay Statute.

2. On November 26, 2013, Certain Underwriters at Lloyd's filed its Answer and Affirmative Defenses to West End Diving and Salvage's Petition, denying all liability.

3. On May 21, 2014, West End Diving and Salvage filed a Motion for Summary Judgment against Certain Underwriters at Lloyd's. In response, on June 30, 2014, Certain Underwriters at Lloyd's filed a Cross Motion for Summary Judgment against West End Diving and Salvage. On September 30, 2014, the parties argued their cross motions for summary judgment in Division 2 of the St. Louis City Circuit Court, and Judge David Dowd took the motions under submission that date. On December 16, 2014, Judge Dowd issued his order denying both motions for summary judgment.

4. On January 28, 2015, Division 1 of the St. Louis City Circuit Court assigned West End Diving and Salvage v. Certain Underwriters at Lloyd's to trial on April 13, 2015, and subsequently assigned the case to Division 11.

5. On April 13, 2015, Plaintiff appeared in Division 11 by Douglas Joergens, president of West End Diving and Salvage Company, and by Gary Burger, Jr., as attorney for West End Diving and Salvage, and Defendant appeared by James Morris, attorney for Certain Underwriters at Lloyd's. Defendant filed a Motion to Enforce Settlement Agreement, which the Judge heard and denied. The parties' attorneys then appeared before Judge Bryan Hettenbach in Division 1 to take up Defendant's Motion for Continuance, which Judge Hettenbach denied.

6. On April 13, 2015, West End Diving and Salvage Company and Certain Underwriters at Lloyd's proceeded to trial after waiving a jury on the record. The evidence was completed the same day. Douglas Joergens, the president of West End Diving and Salvage, and Jerry

Kramer, an appraiser, testified for Plaintiff. Defendant Certain Underwriters at Lloyd's did not present any evidence but its attorney, James Morris, cross-examined the Plaintiff's witnesses. The Court admitted into evidence Plaintiff's Exhibits 1 through 11 and 13 through 16, along with Defendant's Exhibits C and D. The parties' attorneys made their closing arguments, and then the Court took the case under submission.

FINDINGS OF FACT

1. West End Diving and Salvage Company is a Missouri Corporation with business operations in St. Louis County. In addition, West End Diving and Salvage owns and operates a water-filled mine in Bonne Terre, Missouri, along with a bed-and-breakfast facility called The Depot, which was originally a train station in Bonne Terre. Certain Underwriters at Lloyd's is a foreign business licensed to do business in the State of Missouri

2. Since 1987, Certain Underwriters at Lloyd's has issued a policy of insurance to West End Diving and Salvage covering West End Diving and Salvage's real estate, including The Depot in Bonne Terre, Missouri. This policy is identified as Policy Number PR110082. See Plaintiff's Exhibit 1. This policy was in effect on October 27, 2010.

3. On October 27, 2010, a wind storm blew through Bonne Terre, Missouri, and caused damage to a number of properties, including The Depot.

4. West End Diving and Salvage made a claim for damages to Certain Underwriters at Lloyd's under the terms of Policy Number PR110082. Douglas Joergens initially worked with a series of claims adjusters on behalf of Sagicor Claims Management, Inc., located in California and representing Certain Underwriters at Lloyd's.

A remediation company responded to The Depot in the immediate aftermath of the wind storm and took actions to temporarily cover the damaged roof with a tarp and to clean up water damages in the building. Douglas Joergens spoke with Olivia Renteria and John Deer at Sagicor Claims Management during this period. On several occasions, Olivia Renteria promised to send Douglas Joergens a check for \$30,000.00 as a partial payment of West End Diving and Salvage's loss claim so that West End Diving and Salvage could go forward with repairs to the roof at The Depot; however, no check for \$30,000.00 was sent to West End Diving and Salvage.

After a period of time and after no success in resolving West End Diving and Salvage's claim, Douglas Joergens hired Dan Rudman at Golub & Associates to act as claims adjuster for West End Diving and Salvage. Douglas Joergens took this action, at least in part, due to a prior claims experience he had had with Olivia Renteria on behalf of West End Diving and Salvage. In that prior claim, Olivia Renteria had refused to make payments to West End Diving and Salvage. In addition, Douglas Joergens testified that, after an initial period of working with Olivia Renteria at Sagicor Claims Management, he found that he was unable to get people at Sagicor to communicate with him or to give him information about the status of West End Diving and Salvage's claim for damages to The Depot.

5. On January 12, 2012, Dan Rudman submitted West End Diving and Salvage's written proof of loss to Olivia Renteria at Sagicor Claims Management. See Plaintiff's Exhibit 2. The total loss stated under this proof of loss was \$89,266.55 less a deductible of \$1,000.00 leaving the amount claimed at \$88,266.55. On behalf of Certain Underwriters at Lloyd's, Olivia

Renteria denied West End Diving and Salvage's proof of loss and made no payment on the claim for \$88,266.55.

6. Douglas Joergens then proceeded to go through the appraisal option set out in Section E-2 of Certain Underwriters at Lloyd's insurance policy. See Plaintiff's Exhibit 1 at Page 8 of 14. West End Diving and Salvage and Sagicor Claims Management each hired an appraiser. Jerry Kramer represented West End Diving and Salvage, and William Mason represented Sagicor Claims Management. Together, the two appraisers visited The Depot on three or four separate occasions. Jerry Kramer testified that the two appraisers worked together and came up with agreed-upon final figures for their estimates of the replacement cost of repairs and of the actual cash value of repairs. In February of 2013, the appraisers submitted their award document to Sagicor Claims Management setting the value of the replacement cost repairs at \$147,205.33 and the actual cash value repairs at \$112,594.86. See Plaintiff's Exhibits 3. The award document included a detailed breakdown of the specific losses which the appraisers found at The Depot. See Plaintiff's Exhibit 4.

Jerry Kramer testified that no one from Certain Underwriters at Lloyd's or from Sagicor Claims Management told him about any restrictions, reservations, problems or other issues in connection with the appraisal of The Depot. He also testified that an insurance company normally accepts and pays the agreed-upon amount of the appraisal and that, in this case, that amount would be \$112,594.86.

7. On March 28, 2013, Sagicor Claims Management sent Dan Rudman a check payable to Golub & Associates and to West End Diving in the amount of \$87,061.55. See Plaintiff's Exhibit 5. There was no explanation or other information mailed with the check.

In response, Dan Rudman wrote to Olivia Renteria on April 19, 2013, on June 14, 2013 and on July 10, 2013. Each letter stated that West End Diving would treat the check for \$87,061.55 as a partial payment for the total loss claim for The Depot and requested an explanation of the determination that Sagicor Claims Management was not paying the full amount of the appraisers' award. See Plaintiff's Exhibits 6, 7 and 8. Neither Ms. Renteria nor anyone else at Sagicor Claims Management nor anyone at Certain Underwriters at Lloyd's responded in writing to any of Dan Rudman's three letters.

8. Certain Underwriters at Lloyd's has not made any further payments to West End Diving and Salvage on its claim for property damages to The Depot.

CONCLUSIONS OF LAW

1. On October 27, 2010, a wind storm caused damage to West End Diving and Salvage's bed-and-breakfast facility located in Bonne Terre, Missouri, and known as The Depot. At the time of this event, The Depot was covered by an insurance policy issued by Certain Underwriters at Lloyd's. West End Diving and Salvage made a claim against the insurance policy to pay for damages which the wind storm had caused to The Depot.

2. After working directly with Sagicor Claims Management as the representative of Certain Underwriters at Lloyd's for an initial time period, West End Diving and Salvage hired Dan Rudman and Golub & Associates to serve as its claims adjuster. On January 12, 2012, Golub & Associates submitted a written proof of claim to Olivia Renteria at Sagicor Claims Management on behalf of West End Diving and Salvage. The amount of loss submitted for reimbursement under this proof of claim was \$88,266.55. At this point in the claims adjustment process, \$88,266.55 constituted the liquidated damages amount of West End

Diving and Salvage's claim. Sagicor Claims Management, on behalf of Certain Underwriters at Lloyd's, refused to make any payment on this amount.

3. West End Diving and Salvage then used the appraisal process set out in Section E-2 of the insurance policy (see Plaintiff's Exhibit 1 at Page 8 of 14) to further pursue its claim for recovery. West End Diving and Sagicor Claims Management each hired an appraiser. The appraisers worked together to determine the cost to repair the damages to The Depot caused by the wind storm. In February of 2013, the appraisers submitted an appraisal award of \$112,594.86 as the actual cash value of the covered repairs.

4. Despite this appraisers' determination, which followed the rules set out in Certain Underwriters at Lloyd's insurance policy on The Depot, Sagicor Claims Management ignored the award amount and instead sent Golub & Associates and West End Diving and Salvage a check for \$87,061.55. In addition, Sagicor Claims Management and Certain Underwriters at Lloyd's provided no written explanation for how the amount of \$87,061.55 was determined and provided no written information showing the reason or reasons why Sagicor Claims Management was not paying the appraisers' award amount.

5. Under the terms of Certain Underwriters at Lloyd's insurance policy on The Depot, Certain Underwriters at Lloyd's owes West End Diving and Salvage the sum of \$25,533.31 ($\$112,594.86 - \$87,061.55 = \$25,533.31$) in order to complete its payment of the amount due to West End Diving and Salvage based on the appraisers' award.

6. In addition, Certain Underwriters at Lloyd's owes prejudgment interest at the rate of 9.0% per annum to West End Diving and Salvage on liquidated damages as follows:

- a. prejudgment interest from January 10, 2012 to February 20, 2013, on the amount of \$88,266.55 at 9.0% per annum = 406 days at \$21.76 per day = \$8,834.56,
- b. prejudgment interest from February 21, 2013 to March 28, 2013, on the amount of \$112,594.86 at 9.0% per annum = 36 days at \$27.76 per day = \$999.36 and
- c. prejudgment interest from March 29, 2013 to April 15, 2015, on the amount of \$25,533.31 at 9.0% per annum = 748 days at \$6.30 per day = \$4,712.40

Total interest through 4/15/2015 = \$8,34.56 + \$999.36 + \$4,712.40 = \$14,546.32

7. In addition, Certain Underwriters at Lloyd's owes post-judgment interest at the rate of 9.0% per annum to West End Diving and Salvage on liquidated damages in the amount of \$25,533.31 in the amount of \$6.30 for each day after April 15, 2015, during which Certain Underwriters at Lloyd's has not yet paid \$25,533.31 to West End Diving and Salvage.

8. Section 375.420 RSMo applies to the facts of this case. Certain Underwriters at Lloyd's refused to pay West End Diving and Salvage's claim without reasonable cause or excuse. This vexatious refusal to pay the amount due on the claim began immediately after the wind storm damage occurred to The Depot on October 27, 2010. Sagicor Claims Management, as agent for Certain Underwriters at Lloyd's, promised but refused to pay \$30,000.00 as a partial payment while West End Diving and Salvage was still handling the claim itself. Olivia Renteria failed to provide Golub & Associates in writing with any reason(s) why she denied West End Diving and Salvage's proof of claim. Sagicor Claims Management failed to honor the appraisers' award of \$112,594.86 and failed to provide any written notice to Golub & Associates or to West End Diving and Salvage as to the reasons for its payment of \$87,061.55 or as to its reasons for failing to pay the full amount of the appraisers' award.

As a result, Certain Underwriters at Lloyd's owes West End Diving and Salvage penalty damages on \$112,594.86 as follows:

a. 20% due on the first \$1,500.00 = \$300.00 plus

b. 10% due on the remaining \$111,094.86 = \$11,109.48

Total penalty damages due = \$300.00 + \$11,109.48 = \$11,409.48

g. West End Diving and Salvage has claimed that Certain Underwriters at Lloyd's should reimburse West End Diving and Salvage for the costs it paid for hiring Golub & Associates as its adjuster and for hiring Kramer Company Adjusters as its appraiser. These amounts are \$5,223.69 and \$5,995.00 respectively. However, the Court does not have authority under Missouri law to order the insurer to pay either of these amounts. West End Diving and Salvage made the decision to hire Golub & Associates as its adjuster fairly earlier in the claims process. This was the decision of West End Diving and Salvage, and West End Diving and Salvage agreed to pay Golub & Associates' fee. West End Diving and Salvage would have had to pay this fee even if Sagicor Claims Management had promptly paid the full amount of West End Diving and Salvage's claim for damages to The Depot.

Likewise, West End Diving and Salvage made its own decision to participate in the appraisal process set out in the insurance policy which covered claims for property damages to The Depot. Section E-2 of the policy specifically provides that each party to the appraisal process will "(p)ay it chosen appraiser" Plaintiff's Exhibit 1 at Page 8 of 14. West End Diving and Salvage hired Jerry Kramer to serve as its appraiser, pursuant to the terms of the insurance policy, and agreed from the outset to pay his fee.

Nothing in Section 375.420 RSMo allows the Court to transfer these costs to the insurer as the result of its vexatious refusal to pay. As a result, West End Diving and Salvage must pay the amount of \$5,223.69 to Golub & Associates and must pay the amount of \$5,995.00 to Kramer Company Adjustors.

10. Section 375.420 RSMo allows the Court to award West End Diving and Salvage attorney's fees based on Certain Underwriters at Lloyd's vexatious refusal to pay. West End Diving and Salvage has requested leave to submit written evidence in support of its attorney's fees. The Court grants this request and gives West End Diving and Salvage to and including April 27, 2015, to submit written proof of its attorney's fees. Defendant shall then advise the Court not later than May 4, 2015, whether or not it asks for a hearing on Plaintiff's request for an award of attorney's fees.

11. None of Certain Underwriters at Lloyd's affirmative defenses are applicable to the facts of this case in light of the evidence presented at trial.

With regard to the defense of accord and satisfaction, Judge David Dowd's holding in his summary judgment motion remains the applicable law now that the parties have tried the case. Certain Underwriters at Lloyd's has failed to provide any evidence to support its position that its payment of \$87,061.55 was tendered in full satisfaction of West End Diving and Salvage's claim. West End Diving and Salvage maintained from the time it received the check from Sagicor Claims Management that it was treating the payment as a partial satisfaction of its claim and it maintained this position in Golub & Associates' three follow-up letters to Olivia Renteria at Sagicor. Despite these three letters and West End Diving and Salvage's consistent position on the nature of the March 28, 2013 payment, neither Certain Underwriters at Lloyd's

nor Sagacor Claims Management provided Golub & Associates or West End Diving and Salvage with anything in writing contradicting or contesting West End's position. As Judge Dowd noted, there is "no conspicuous statement to the effect that the instrument was tendered in full satisfaction of the claim." Summary Judgment Order Dated 12/16/2014 at Page 6.

With regard to the defense that the insurance policy was void or unenforceable due to a misrepresentation made by Douglas Joergens at the time West End Diving and Salvage initially applied the Certain Underwriters at Lloyd's for coverage on The Depot, Certain Underwriters offered no evidence at trial to confirm that a misrepresentation had been made or that West End Diving and Salvage was responsible for the misrepresentation. In addition, West End Diving and Salvage originally applied to Certain Underwriters at Lloyd's for insurance coverage in 1987. Thirteen years had passed between that application and the loss which occurred at The Depot on October 27, 2010. The misrepresentation, if any, by West End Diving and Salvage or by its agent in its initial application for coverage would have long since been waived by Certain Underwriters of Lloyd's multiple renewals of the insurance coverage.

With regard to the defense that The Depot's train cars were not covered by Certain Underwriters of Lloyd's insurance policy, Douglas Joergens testified that the railroad cars in question were affixed to their tracks and could not be moved. In addition, the railroad cars had utility lines running into them which further showed that they were a part of The Depot's bed-and-breakfast facility. Defendant provided no evidence to show that the railroad cars were not covered by the policy.

With regard to the issue of the cause of damage to the underlayment of the parquet floors in The Depot, Defendant presented no evidence at trial about this issue.

ORDERS

Based on its findings and conclusions set out in this decision, the Court orders, adjudges and decrees that:

1. The Court finds in favor of Plaintiff West End Diving and Salvage Company and against Defendant Certain Underwriters at Lloyd's. The Court orders Defendant Certain Underwriters at Lloyd's to pay damages to Plaintiff West End Diving and Salvage in the amount of \$25,533.31 as the balance due on Plaintiff's claim for the cost of repairs to The Depot under the terms of the insurance agreement. Defendant shall also pay prejudgment interest on the balance due to Plaintiff in the amount of \$14,546.32. See Appendix for calculation of damages.

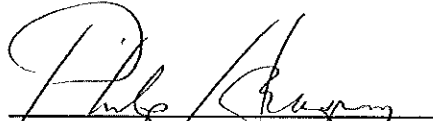
Post-judgment interest on the award of \$25,533.31 shall accrue at the rate of \$6.30 per day beginning April 16, 2015.

2. The Court finds in favor of Plaintiff West End Diving and Salvage Company and against Defendant Certain Underwriters at Lloyd's on Plaintiff's claim for vexatious delay on the part of Defendant. The Court orders Defendant Certain Underwriters at Lloyd's to pay Plaintiff West End Diving and Salvage Company the amount of \$11,409.48 as the penalty amount provided by Section 375.420 RSMo on the appraisers' award of \$112,594.86.

3. The Court finds in favor of Plaintiff West End Diving and Salvage Company and against Defendant Certain Underwriters at Lloyd's concerning an award of Plaintiff's attorney's fees. Plaintiff shall submit written proof of its fees to Defendant's attorney and to the Court not later than April 27, 2015. Defendant shall advise the Court not later than May 4, 2015, whether or not it requests a hearing on the issue of Plaintiff's attorney's fees.

4. The Court taxes the costs of this case against Defendant Certain Underwriters at Lloyd's.

SO ORDERED:



Philip D. Heagney #27484
Circuit Judge, Division 11

April 15, 2015

Cc: Gary K. Burger, Jr., Attorney for Plaintiff (12283 Olive Blvd 63141)
James C. Morris, Attorney for Defendants (7710 Carondelet Ave, #217, 63105)

APPENDIX – ITEMIZED DAMAGES AWARDED

1. Balance Due on Claim for Property Damages to The Depot

Original amount of cost of repairs	\$112,594.86
Less amount paid on 3/28/2013	<u>87,061.55</u>
Balance due	\$ 25,533.31

2. Prejudgment Interest Due on Claims for Property Damages to The Depot

Prejudgment interest from January 10, 2012 to February 20, 2013,
on the amount of \$88,266.55 at 9.0% per annum = 406 days at \$21.76
per day = \$8,834.56

Prejudgment interest from February 21, 2013 to March 28, 2013,
on the amount of \$112,594.86 at 9.0% per annum = 36 days at \$27.76
per day = \$999.36

Prejudgment interest from March 29, 2013 to April 15, 2015,
on the amount of \$25,533.31 at 9.0% per annum = 748 days at \$6.30
per day = \$4,712.40

Total interest through 4/15/2015 = \$8,834.56 + \$999.36 + \$4,712.40 = **\$14,546.32**

3. Penalty Due for Vexatious Delay under Section 375.420 RSMo

20% due on the first \$1,500.00 =	\$300.00
10% due on the remaining \$111,094.86 =	<u>11,109.48</u>
Total penalty damages due \$11,109.48 =	\$11,409.48

4. Total Judgment Amount

Balance due on property damages	\$25,533.31
Prejudgment interest thru 4/15/2015	14,546.32
Penalty due for vexatious delay	<u>11,409.48</u>
Total Judgment Amount	\$51,489.11¹

¹ This amount does not include post-judgment interest after 4/15/2015 in the amount of \$6.30 per day and does not include Plaintiff's attorney's fees.