

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

BUILDERS MUTUAL INSURANCE COMPANY,

Plaintiff,

v.

HALF COURT PRESS, L.L.C., ET AL.,

Defendants.

CIVIL ACTION NO. 6:09-CV-00046

MEMORANDUM OPINION

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE

Plaintiff insurance company seeks a declaratory judgment¹ that it does not owe Defendant property developers a duty to provide insurance coverage or a defense against allegations brought against one of the Defendants in an underlying civil suit in Amherst County, which alleges that the Defendant's actions damaged a private pond. Although coverage for the allegations in the underlying complaint regarding sediment pollution are arguably excluded by the policy's "Total Pollution Exclusion," the allegations in the underlying complaint are not restricted to pollution damage. Accordingly, Plaintiff is not entitled to the requested declaratory judgment.

I.

Defendants in this action are Half Court Press, L.L.C. ("Half Court") and Riverview Property Development Group, L.L.C. ("Riverview"). Half Court is also the defendant in an

¹ A district court has jurisdiction, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), to determine the scope of insurance coverage concerning an ongoing dispute in state court. *See Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004). Though exercise of this authority is discretionary, a declaratory judgment is appropriate when it would "serve a useful purpose in clarifying and settling the legal relations in issue, and . . . terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937).

underlying action in the Circuit Court for Amherst County, *Robert L. Sales v. Half Court Press, LLC* (the “Sales complaint,” or the “Amherst County case”). The Sales complaint accuses Half Court, as developer of a tract of property in Amherst County into a residential subdivision known as “Abee Manor,” of damaging Mr. Sales’ property, which is downslope from “Abee Manor” and includes a lake or pond, by Half Court’s negligent failure “to create and maintain sufficient detention basins and erosion and sediment control measures” during development of the Abee Manor project, which in turn caused Mr. Sales’ property to be damaged by “the continued presence of such **water**, dirt, spoil, rock, sand, silt, debris and/or other such sediment.” (Emphasis added.) The Sales complaint seeks, *inter alia*, Half Court’s remediation of this damage and to enjoin Half Court from further development of the tract unless and until Half Court “creates and maintains sufficient detention basins and erosion and sediment control measures to prevent the unauthorized discharge of sediment” into Mr. Sales’ lake.

Builders Mutual Insurance Company (“Builders Mutual”), Plaintiff in the instant action, issued a commercial general liability policy (the “policy”) to Riverview for the policy period March 13, 2008, through March 13, 2009. That policy was later renewed for the term March 13, 2009, through March 13, 2010 (the “renewal policy”). On March 11, 2009, Riverview’s insurance agent requested to add Half Court as an additional insured on the policy, pursuant to which Half Court was thereafter added to the renewal policy. However, Half Court was not an insured under the original policy for 2008-2009.²

² With their answer, Defendants filed a counter-complaint, asserting that the denial of coverage and the denial of a defense to Half Court for the claims made in the Sales complaint constitutes a breach of contract. In their counter-complaint, Defendants implicitly acknowledge that Half Court is not covered under the original policy for 2008-2009: “Half Court and Riverview believe and therefore allege that the policy at issue and its renewal clearly include Half Court as an ‘insured’, [*sic, punct.*] *at least for the term beginning no later than March 13, 2009.*” (Emphasis added.)

On May 18, 2009, the Sales complaint was filed in the Circuit Court for Amherst County.³ Plaintiff asserts that the damage alleged in the Sales complaint occurred, if it occurred, during the 2008-09 policy period, and that both Defendants knew of Mr. Sales' allegations of property damage in connection with Abee Manor prior to the March 11, 2009, request to add Half Court as an insured to the 2009-2010 renewal policy.⁴

On June 15, 2009, Builders Mutual notified Riverview by letter that a review of the Sales complaint and the policy indicated that Half Court might not be covered, and that Builders Mutual, with a full reservation of rights, would provide a defense until Builders Mutual could determine whether the policy covered Half Court. On August 5, 2009, Builders Mutual wrote to Riverview, denying coverage to Half Court under the policy, based on a determination that Half Court was not an insured under the policy and that, assuming *arguendo* that Half Court was covered under the policy, the claims asserted in the Sales complaint were excluded from coverage under the policy's Total Pollution Exclusion.

Builders Mutual's instant motion for summary judgment (docket no. 16) addresses and relies upon the Total Pollution Exclusion. An endorsement to the policy and the renewal policy,

³ Plaintiff repeatedly states that the Sales complaint was filed on *March* 18, 2009. Plaintiff has submitted a copy of the Sales complaint, and it is clear that it was filed on *May* 18, 2009.

⁴ For example, Plaintiff alleges that the minutes of a January 22, 2009, meeting of the Board of Directors of the Robert E. Lee Soil & Water Conservation District refers to the Watershed Coordinator's report of consultations with various natural resource agencies regarding the "Robert Sales Pond/Abee Manor Development erosion and sediment control issues." In its reply to Defendant's response in opposition, Plaintiff notes that,

[s]hould this matter proceed to trial, Plaintiff is independently entitled to a declaratory judgment on prior knowledge grounds. First, Half Court was added as an additional insured after the inception of the 2009-2010 Renewal Policy, but the alleged acts and damages are alleged to have occurred in 2008. Second, at least one insured knew of the property damage alleged by Sales prior to the policy period of the 2009-2010 Renewal Policy.

However, as this argument is merely noted, it has not been briefed and argued for my consideration.

entitled “TOTAL POLLUTION EXCLUSION ENDORSEMENT,” excludes from coverage “‘bodily injury’ or ‘property damage’ which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants’ at any time.” The term “pollutant” is defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.” In Plaintiff’s view, its motion for declaratory judgment regarding its duty to defend Half Court should be granted because all of the claims against Half Court in the underlying Amherst County action are excluded from coverage under the Total Pollution Exclusion.

II.

A.

A court may grant a motion for summary judgment only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that [the moving party] is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The “party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion” and “demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue of material fact exists under Rule 56 “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When evaluating a motion under Rule 56, the Court must construe all “facts and inferences to be drawn from the facts . . . in the light most favorable to the non-moving party.” *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (quotations omitted).

B.

“A federal court hearing a diversity claim must apply the choice-of-law rules of the state in which it sits.” *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir. 2005). Here, it is undisputed that Virginia law governs.

“Under Virginia law, an insurer’s obligation to defend an action ‘depends on comparison of the policy language with the underlying complaint to determine whether any claims alleged [in the complaint] are covered by the policy.’” *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 93 (4th Cir. 2003) (quoting *Superformance Int’l, Inc. v. Hartford Cas. Ins. Co.*, 332 F.3d 215, 220 (4th Cir. 2003)) (alteration in the original). This is referred to as the “eight corners rule.” *Erie Ins. Exch. v. State Farm Mut. Auto. Ins. Co.*, 2002 WL 32075410, at *5 (Va. Cir. Ct. December 16, 2002). The eight corners rule requires a court to “compare the four corners of the insurance policy against the four corners of the underlying complaint to determine if any allegations may potentially be covered by the policy.” *CACI Intern., Inc. v. St. Paul Fire and Marine Ins. Co.*, 566 F.3d 150, 154 (4th Cir. 2009) (quotation omitted). In other words, I must determine whether “the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy.” *Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 413 (quotation omitted).

The insured has the burden to prove coverage, *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 636 (4th Cir. 2005), while “the insurer bears the burden of proving that an exclusion applies,” *Bohreer v. Erie Ins. Group*, 475 F. Supp.2d 578, 585 (E.D. Va.2007).⁵

⁵ “The duty to defend is broader than the duty to indemnify because it ‘arises whenever the complaint alleges
(continued...)”

III.

The “Total Pollution Exclusion” has been held to be unambiguous as a matter of law, and is widely enforced to deny insurance coverage for property damage allegedly caused by “pollution” as defined within the exclusion. *See, e.g., City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 271 Va. 574, 578 (2006); *West American Ins. Co. v. Johns Bros., Inc.*, 435 F. Supp. 2d 511 (E.D. Va.); *Firemen’s Ins. Co. of Wash., D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779 (E.D. Va. 2007). Assuming for the sake of argument that the silt and other sediment runoff alleged in the Sales complaint meets the policy’s definition of “pollutant,” which the policy defines as, *inter alia*, “any solid . . . contaminant,” then the runoff sediment alleged in the Sales complaint could be found to constitute pollutants for the purpose of the Total Pollution Exclusion. *See, e.g., Pennsylvania Nat. Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 121 F.3d 699 (Table) (4th Cir. 1997); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560, 564 (E.D. N.C.) (“reasonable persons conducting business in defendant’s position should recognize that sedimentation is considered a pollutant.”).⁶

⁵(...continued)

facts and circumstances, some of which, if proved, would fall within the risk covered by the policy.” *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 636 (4th Cir. 2005) (quoting *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189 (1990)); *see also School Board of Newport News v. Commonwealth*, 279 Va. 460, 472 (2010). “[I]f it is doubtful whether the case alleged is covered by the policy, the refusal of the insurer to defend is at its own risk.” *Brenner*, 240 Va. at 189 (citing *London Guar. Co. v. White & Bros., Inc.*, 188 Va. 195, 199-200 (1948)); *see also School Board of Newport News*, 279 Va. at 472-73. “And, if it be shown subsequently upon development of the facts that the claim is covered by the policy, the insurer necessarily is liable for breach of its covenant to defend.” *Id.* (citing *London Guar. Co.*); *see also School Board of Newport News*, 279 Va. at 472-73. With its answer, Defendant filed a counter-claim for breach of contract.

⁶ *Triangle Paving* originated in the Eastern District of North Carolina, and dealt with North Carolina’s unique regulatory framework. Virginia has its own statutory and regulatory program dealing with sediment control from land disturbances arising from construction sites. *See* Virginia Erosion and Sediment Control Law, Title 10.1, Chapter 5, Article 4 of the Code of Virginia. The applicable regulations are found in the Virginia Administrative (continued...)

However, the Sales complaint alleges that, during the development of the Abee Manor project, Half Court's negligent failure "to create and maintain sufficient **detention basins** and **erosion** and sediment **control measures**" caused Mr. Sales' property to be damaged by "the continued presence of such **water**, dirt, spoil, rock, sand, silt, debris and/or other such sediment." (Emphasis added.) In short, the complaint alleges damage from water, in addition to damage from sediment. Water is not a pollutant under the exclusion, and damage from "water" does not fall under the exclusion. See *State Auto Property and Cas. Ins. Co. v. Gorsuch*, 323 F. Supp. 2d 746, 753 (W.D. Va. July 08, 2004) ("the unambiguous wording of the exclusion does not define water as a pollutant")⁷; see also *Nationwide Mut. Ins. Co. v. Boyd Corp.*, 2010 WL 331757 *3-4

⁶(...continued)
Code, 4VAC50-30.

The Code of Virginia, § 10.1-1181.1, defines "pollution" as

such alteration of the physical, chemical, or biological properties of any state waters resulting from **sediment deposition** as will or is likely to create a nuisance or render such waters (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish, or wildlife; (ii) unsuitable with reasonable treatment for use as a present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses.

(Emphases added.) Section 3.2-400 of the Code of Virginia similarly defines pollution as "any alteration of the physical, chemical, or biological properties of any state waters resulting from **sedimentation**, nutrients, or toxins." (Emphases added.) "State waters" is defined as "all water, on the surface or in the ground, wholly or partially within or bordering the Commonwealth, or within its jurisdiction." *Id.*

Federal law also defines "sedimentation" as pollution. See *US v. Bedford*, 2009 WL 1491224 (E.D. Va. May 22, 2009) (observing that the Clean Water Act, "section 502(6)[.] defines 'pollutant[s]' to include fill materials such as 'dredged spoil . . . biological materials, . . . rock, sand, [and] cellar dirt.'" (citing 33 U.S.C. § 1362(6)).

⁷ Furthermore, in *Gorsuch*, then-Chief Judge Jones observed that,

in contrast to the unique treatment of sedimentation by the North Carolina legislature [at issue in *Triangle Pavement*, *supra*] and the resulting determination that it was a pollutant, other cases addressing the artificially-induced movement of natural elements have all found such substances to not be pollutants. Most persuasive are *Purity Spring Resort v. TIG Insurance Co.*, No. CIV. 99-295-JD, 2000 WL 1507429 (D.N.H. July 18, 2000) and *Incorporated Village of Cedarhurst v. Hanover Insurance Co.*, 89 N.Y.2d 293, 653 N.Y.S.2d 68, 675 N.E.2d 822 (1996). In *Purity Spring*, the court resolved a factual situation in which property owned by an operator of a natural

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(E.D. Va. January 25, 2010) (“[t]he Court finds that the [underlying state court] complaint contains allegations of damage attributable to excess water flow and stormwater runoff, which cannot be considered ‘pollutants’ under the policy exclusion”).

Although Plaintiff contends that any reference to “water” in the Sales complaint is “in conjunction with, and not separate[] from, the . . . allegation that the damage was done by the sediment and debris contained in the water,” it is beyond my jurisdiction to parse the language of the underlying state court complaint. The complaint alleges damage from “the continued presence of such **water**,” in addition to “dirt, spoil, rock, sand, silt, debris and/or other such sediment.”⁸ (Emphasis added.) As previously stated, “[u]nder Virginia law, an insurer’s

⁷(...continued)

spring site became flooded when an upstream lake owner raised the flood gates on a dam located at the lake’s outlet, allowing flooding of the plaintiff’s property and causing bacterial contamination of its springs. Effectively addressing the facts presently before this court, the district court held the pollution exclusion clause inapplicable, explaining that the

allegations are not that the water released from the lake was polluted or contaminated. Instead, the allegations are that flooding caused by the release of water from the lake resulted in contamination of the springs with surface bacteria. . . . A reasonable reading of [the] allegations is that the contamination claimed was the result of flooding, not that the lake water was polluted. [Thus,] release of the lake water did not constitute release of a pollutant within the meaning of the pollution exclusion in the policy.

Purity Spring, 2000 WL 1507429, at *5. Likewise, in *Cedarhurst*, the overflow of water and sewage from a municipal sewage system that caused several residents’ basements to flood was found to not be subject to the pollution exclusion clause because the allegations in the underlying tort action stated that the injuries resulted from the “flood-like event” and did not allege “an injury from the ‘polluting,’ irritating or contaminating nature of the sewage.” *Cedarhurst*, 653 N.Y.S.2d 68, 675 N.E.2d at 824. Thus, both of these cases further substantiate that uncontaminated water has not been treated as a pollutant under the plain and ordinary meaning of the term in the pollution exclusion clause.

323 F. Supp. 2d at 755.

⁸ Plaintiff attempts to distinguish the instant case from *Gorsuch* and *Boyd*, arguing that these cases are inapposite here because they concern allegations of excess water flow, and that “the Sales Complaint here does not allege damage caused by ‘excess water flow.’” I direct Plaintiff’s attention to the Sales complaint, which alleges the following: “the unauthorized, needless and negligent discharge of, among other things, **water**, dirt, spoil, rock,
(continued...)

obligation to defend an action ‘depends on comparison of the policy language with the underlying complaint to determine whether **any** claims alleged [in the complaint] are covered by the policy.’” *America Online, Inc.*, 347 F.3d at 93 (quoting *Superformance Int’l, Inc.*, 332 F.3d at 220) (emphasis added; alteration in the original); *see also CACI Intern., Inc.*, 566 F.3d at 154 (Virginia’s eight corners rule requires a court to “compare the four corners of the insurance policy against the four corners of the underlying complaint to determine if **any** allegations may **potentially** be covered by the policy” (emphasis added; quotation omitted)); *Penn-America Ins. Co.*, 368 F.3d at 413 (a court considering an insurer’s duty to defend must determine whether “the complaint against the insured alleges facts and circumstances, **some of which, if proved, would fall within the risk covered by the policy**” (emphasis added; quotation omitted)).

Accordingly, I find that the allegations in the Sales complaint are sufficient to compel a duty to defend, to the extent an appropriate Defendant is covered under the policy or the renewal policy.

⁸(...continued)

sand, silt, debris and / or other such sediment”; seeks “to enjoin and further discharge of **water**, dirt, spoil, rock, sand, silt, debris and / or other such sediment”; alleges that “the defendant . . . is . . . responsible for “the unauthorized, needless and negligent discharge of **water**, dirt, spoil, rock, sand, silt, debris and / or other such sediment”; that “the defendant[] knew or should have known that **storm water runoff** from the defendant’s property drains south into . . . the plaintiff’s lake”; “defendant knew or should have known that the plaintiff’s adjoining property and lake was a potential critical erosion are and that appropriate precautions would be needed to prevent erosion from occurring and **large volumes of storm water** . . . from flowing onto the plaintiff’s property and into the plaintiff’s lake”; “defendant also knew or should have known that the development . . . would interfere with the natural drainage of **surface and storm water** and would produce an **increase in storm water runoff**”; “defendant had and has a duty to create and maintain adequate detention basins on its property to **store the storm water runoff** so that such **storm water runoff** and sediment would not leave the defendant’s property at a rate and volume that **exceeded** the predevelopment rates and volumes”; “defendant also had and has a duty to implement and maintain **vegetative and structural erosion** and sediment control measures”; “defendant also had and has a duty . . . to not pour **water** . . . onto the property of the adjoining owners, which constitutes an unauthorized trespass”; “defendant had and has . . . duties to the plaintiff so that the plaintiff would not suffer injury to his property by having **water** . . . deposited thereon”; “defendant should be enjoined . . . until such time as the defendant . . . creates and maintains . . . measures to prevent the **unauthorized discharge of . . . storm water** onto the real estate and into the lake of the plaintiff”; “[t]he plaintiff is entitled to be free of this **foreign water** . . . and the plaintiff is entitled to remediation of such damage by removal of such **water**”; and “plaintiff respectfully moves this Court for entry of an order enjoining any further discharge of **storm water**. . . .”

IV.

For the foregoing reasons, Plaintiff's motion for summary judgment (docket no. 16) is denied. An appropriate order accompanies this memorandum opinion.

The Clerk of the Court is hereby directed to send a certified copy of this memorandum opinion and the accompanying order to all counsel of record.

Entered this *3rd* day of August, 2010.

/s/ Norman K. Moon
NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

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ORDER

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE

For the reasons stated in the accompanying memorandum opinion, Plaintiff's motion for summary judgment (docket no. 16) is DENIED.

The Clerk of the Court is directed to send a certified copy of this order and the accompanying memorandum opinion to all counsel of record.

It is so ORDERED.

Entered this *3rd* day of August, 2010.

/s/ Norman K. Moon

NORMAN K. MOON

SENIOR UNITED STATES DISTRICT JUDGE