IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THE WASHINGTON HOUSE CONDOMINIUM ASSOCIATION OF OWNERS, On Its Own Behalf And On Behalf of Multiple Unit Owners, and WILLIAM E. MONTGOMERY, and TAMARA A. MONTGOMERY, Individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. N15C-01-108 WCC CCLD
DAYSTAR SILLS, INC., a Delaware Corporation, DAVID N. SILLS, IV, WASHINGTON HOUSE PARTNERS, LLC, a Delaware Limited Liability Company, ARCHITECTURAL CONCEPTS, P.C., a Pennsylvania Corporation, AVALON ASSOCIATES OF MARYLAND, INC., a Maryland Corporation, and ENVIRONMENTAL STONEWORKS, LLC a Delaware Limited Liability Company,	)	
Defendants.	)	

Submitted: June 29, 2018
Decided: November 13, 2018

Plaintiffs' Rule 54(B) Motion for Revision of the Court's Interlocutory Order Dismissing Plaintiffs' Complaint Against Defendant Environmental Stoneworks, LLC - GRANTED

Plaintiffs' Motion for an Award of Attorneys' Fees and Costs Against Defendant Environmental Stoneworks, LLC - DENIED

MEMORANDUM OPINION

Elizabeth Wilburn Joyce, Esquire (Argued); Seton C. Mangine, Esquire; Pinckney, Weidinger, Urban & Joyce LLC, 3711 Kennett Pike, Suite 210, Greenville, DE 19807. Attorneys for Plaintiffs.

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Andrew J. Connolly, Esquire (Argued); Matthew D. Johnson, Esquire; Post & Schell, P.C., Four Penn Center, 1600 John F. Kennedy Blvd., Philadelphia, PA 19103. Attorneys for Defendant, Environmental Materials, LLC d/b/a Environmental StoneWorks.

CARPENTER, J.

The Washington House Condominium Association of Unit Owners ("WHCA"), on its own and on behalf of multiple unit owners ("Washington House" or the "Condominium"), William E. Montgomery, and Tamara A. Montgomery (collectively "Plaintiffs") move for a Rule 54(b) Revision of the Court's Interlocutory Order Dismissing Plaintiffs' Complaint against Defendant Environmental Materials, LLC d/b/a Environmental StoneWorks ("Defendant" or "ESW"). Plaintiffs also seek an Award of Attorneys' Fees and Costs against ESW.

As explained further herein, Plaintiffs' Rule 54(b) Motion for Revision of the Court's Interlocutory Order Dismissing Plaintiffs' Complaint Against Defendant ESW is GRANTED, and their Motion for an Award of Attorneys' Fees and Costs against ESW is DENIED.

FACTUAL & PROCEDURAL BACKGROUND

This litigation arises from the allegedly defective design and construction of Washington House, located on Main Street in Newark, Delaware.[1] The Condominium contains fifty-four residential units and four commercial units, two of which are owned by the University of Delaware.[2]

[1] Compl. ¶ 1.
[2] *Id.*

Although construction on the Condominium was completed in 2008, Plaintiffs did not discover the serious structural issues plaguing the building until 2014.[3] On January 14, 2015, Plaintiffs filed a complaint (the "Complaint") against six defendants to recover more than $7 million in repair costs and related expenses arising from design and construction defects at Washington House.[4]

A. THE ESW-DAYSTAR ACTION

Daystar Sills, Inc. ("Daystar") served as the developer, builder, and general contractor for the Condominium project, and was one of the six defendants named in Plaintiffs' Complaint.[5] Defendant ESW was hired by Daystar to install the exterior masonry veneer, which is the primary construction issue,[6] at Washington House.

On January 30, 2009, ESW instituted a mechanics' lien action against Daystar because it had not been paid for its exterior work on the Condominium.[7] Daystar filed a counterclaim against ESW in response, alleging breach of contract, breach of express and implied warranties, and negligence.[8]

The parties entered into arbitration to resolve their dispute, agreeing that it would serve as a final adjudication on the matter.[9] On January 6, 2012, the arbitrator

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[3] *Washington House Condo. Ass'n of Unit Owners v. Daystar Sills, Inc.*, 2015 WL 6750046, at *1 (Del. Super. Ct. Oct. 28, 2015).
[4] Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 1.
[5] *See Washington House Condo. Ass'n of Unit Owners*, 2015 WL 6750046, at *1-2.
[6] *Washington House Condo. Ass'n of Unit Owners v. Daystar Sills, Inc.*, 2017 WL 3412079, at *1 (Del. Super. Ct. Aug. 8, 2017).
[7] *Id.* at *3.
[8] *Id.*
[9] *Washington House Condo. Ass'n of Unit Owners*, 2015 WL 6750046, at *1.

entered a final order, which required ESW to pay $400,000 to Daystar.[10] The $400,000 judgment against ESW was satisfied on March 2, 2012.[11]

B. INSTANT LITIGATION

Plaintiffs filed their Complaint against six defendants on January 14, 2015, seeking to recover more than $7 million in damages for repair costs and related expenses "arising from design and construction defects — notably, the systemic failure of exterior brick and stone veneer ..."[12]

This Court dismissed Plaintiffs' Complaint against Defendant ESW on the basis of res judicata in its October 28, 2015 Opinion.[13] Now, Plaintiffs argue that new evidence, which was not available to the Court at the time of its October 2015 decision, refutes a finding of privity between Plaintiffs and Daystar for res judicata purposes. On this basis, Plaintiffs have moved for the Court to reconsider its interlocutory order and deny the dismissal of Plaintiffs' Complaint against ESW.

Plaintiffs have now settled their claims against five of the defendants: Daystar, David N. Sills, IV ("Sills"), Washington House Partners, LLC ("WHP"), Architectural Concepts, P.C. ("AC"), and Avalon Associates of Maryland, Inc. ("Avalon") (collectively, the "Settling Defendants").[14] All of Plaintiffs' claims

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[10] *Id.*
[11] *Id.*
[12] Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 1.
[13] *Washington House Condo. Ass'n of Unit Owners*, 2015 WL 6750046, at *7.
[14] Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 2.

against the Settling Defendants have been voluntarily dismissed with prejudice, in accordance with the settlement agreements, and with the Court's approval.[15]

The Settling Defendants all previously filed cross-claims for contribution and indemnity against ESW.[16] This Court denied ESW's motion to dismiss the cross-claims in its August 2017 Opinion.[17] At the pretrial conference on October 27, 2017, the Court severed the indemnity cross-claims against ESW for separate disposition.[18] Pursuant to the settlements, the Settling Defendants have assigned their indemnity claims to WHCA, and Plaintiffs are now the real parties in interest on the assigned claims.[19]

The indemnity claims against ESW are based in part on the Subcontract between Daystar and ESW ("ESW Subcontract" or "Subcontract"), which contained an indemnification provision that included attorneys' fees.[20] Based on the assignments of the Settling Defendants' indemnity claims to WHCA, Plaintiffs now seek to recover those defense costs and attorneys' fees from ESW.[21]

This is the Court's decision on Plaintiffs' Motions.

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[15] *Id. See also* D.I. 347, 383.
[16] *Id.* ¶ 3. *See also* D.I. 18, 59, 60, 88, 97.
[17] *Washington House Condo. Ass'n of Unit Owners*, 2017 WL 3412079, at *11, 13.
[18] Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 4. *See also* D.I. 370.
[19] *Id. See also* D.I. 376, 380.
[20] *See* Pls. Mot. for an Award of Att'ys' Fees and Costs, Ex. A.
[21] Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 5.

DISCUSSION

I. MOTION FOR REVISION OF THE COURT'S INTERLOCUTORY ORDER DISMISSING PLAINTIFFS' COMPLAINT AGAINST DEFENDANT ENVIRONMENTAL STONEWORKS, LLC

Under Delaware Superior Court Civil Rule 54(b), "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."[22]

Revision of a decision under Rule 54(b) is "permitted in very limited circumstances."[23] As this Court has previously stated:

> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.[24]

Furthermore, a Rule 54(b) revision "should occur only where the court is convinced it is clearly wrong ..."[25]

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[22] Super. Ct. Civ. R. 54(b).
[23] *Bowles v. White Oak, Inc.*, 1990 WL 35271, at *1 (Del. Super. Ct. Mar. 19, 1990).
[24] *Id.*
[25] *Crowell Corp. v. Himont USA, Inc.*, 1994 WL 762663, at *1 (Del. Super. Ct. Dec. 8, 1994).

Plaintiffs argue that evidence obtained in discovery shows "Daystar's interests and Plaintiffs' interests were not identical or closely aligned, and Plaintiffs were not actively and adequately represented in the ESW-Daystar Action" to support a finding of privity between the parties.[26] Plaintiffs primarily suggest that Daystar was unable to adequately represent their interests in the ESW-Daystar Action because it had to defend against its own contributory negligence, of which Plaintiffs now have "substantial evidence."[27] For this reason, according to Plaintiffs, the privity element of res judicata is no longer satisfied and ESW's Motion to Dismiss Plaintiffs' Complaint should now be denied.[28] Additionally, Plaintiffs contend that revision of the Court's Order granting ESW's Motion to Dismiss is necessary to prevent manifest injustice.[29]

In response, Defendant ESW argues that the allegedly new evidence offered by Plaintiffs is not actually new and does not constitute a significant change in the facts to warrant revision of the Court's Order.[30] ESW also claims that Plaintiffs waived their prevention of manifest injustice argument by failing to raise it in earlier pleadings.[31]

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[26] Pls. Opening Br. in Support of Their Rule 54(b) Mot. at 6, 11-12.
[27] *See id.* at 7-8.
[28] *See id.* at 11-12.
[29] *Id.* at 12-16.
[30] Def. Br. in Opp'n to Pls. Rule 54(b) Mot. at 6-7.
[31] *Id.* at 8-9.

Under Delaware law, the doctrine of res judicata bars a subsequent action when the following five elements are present:

> (1) the original court had jurisdiction over the subject and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the party in the case at bar; and (5) the decree in the prior action was a final decree.[32]

The Court now finds that ESW can no longer satisfy all five elements of res judicata because privity does not in fact exist between Plaintiffs and Daystar. In making a privity determination, the trial court should examine "'whether the relationship between the parties is sufficiently close to support preclusion.' Parties are in privity for res judicata when their interests are identical or closely aligned such that they were actively and adequately represented in the first suit."[33] Additionally, privity is said to exist when the "'relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit …'"[34]

After more than three years of litigation and attendant discovery, and various filings and arguments in this case, the Court now believes its earlier finding of privity

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[32] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009).
[33] *Aveta Inc. v. Cavallieri*, 23 A.3d 157, 180 (Del. Ch. 2010) (quoting *Higgins v. Walls*, 901 A.2d 122, 138 (Del. Super. Ct. 2005)).
[34] *Grunstein v. Silva*, 2011 WL 378782, at *8 (Del. Ch. 2011) (quoting *Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *8 (Del. Ch. 2009).

was simply wrong. In its earlier opinion, the Court based its' privity finding on the commonality of the action, that is the negligence of ESW, rather than the alignment of interests between Daystar and the Washington House unit owners. The fact, as previously found, that the negligence claims asserted in arbitration, as well as the claims here, related to the same negligence, does not automatically lead to the conclusion that the litigation interests of the builder/contractor and the unit owners are the same. In fact, as discovery has clearly revealed in this case, nothing could be further from the truth. The misconduct of Daystar was instrumental to the litigation claims, and this malfeasance by the builder/contractor creates an adverse interest that would prohibit the finding of privity.

The Court agrees that Plaintiffs can readily establish the extent to which Daystar's negligent oversight as the developer, builder, and general contractor for Washington House contributed to their current predicament. Although Plaintiffs' Complaint alleged Daystar's negligence generally,[35] Plaintiffs did not know if or how that negligence specifically impacted the ESW-Daystar Action at the time of ESW's Motion to Dismiss in the preliminary stages of litigation. Now, Plaintiffs have the benefit of completed discovery and can more fully demonstrate that their interests were not actually aligned with Daystar's in the ESW-Daystar Action.

[35] *See* Complaint ¶¶ 82-92.

The Court believes that Daystar would have been preoccupied with attempting to conceal, minimize, or defend against its own role in the Condominium's failed exterior during the ESW-Daystar Action,[36] which is an issue that Plaintiffs, unsurprisingly, do not have to be concerned with in litigating their own claims against ESW. It cannot be said that an arbitration award regarding ESW's negligent workmanship and liability to Daystar, which undoubtedly shared responsibility for the faulty exterior at Washington House, is conclusive as to Plaintiffs, who, by contrast, have no culpability in the matter. Furthermore, the Court specifically found in its August 8, 2017 Opinion that "[t]he relationship between the Condominium owners and ... [the] various entities created or used for the project was not a harmonious one with clear lines of communication and *a commonality of interest*."[37]

The Court finds that Plaintiffs' claims against Defendant ESW are no longer barred by the ESW-Daystar arbitration under the doctrine of res judicata. These are the "very limited circumstances" [38] where the Court finds its earlier decision was simply wrong and when revision of a decision under Rule 54(b) should be permitted. Therefore, Plaintiffs' Rule 54(b) Motion for Revision of the Court's Interlocutory

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[36] In its August 2017 Opinion, the Court noted that "original design plans for the Washington House specified that the building would be constructed with a 'full brick' exterior. However, sometime in late spring/early summer 2007, Mr. Sills [of Daystar] approved the decision to use 'thin brick' veneer in place of the full brick for cost and time-saving purposes." Architectural Concepts, P.C., the architectural firm Daystar hired to prepare design plans for the Condominium, "expressed concern about using thin brick for a project like the Washington House. Daystar nevertheless sought to move forward with the thin brick system ..." *Washington House Condo. Ass'n of Unit Owners*, 2017 WL 3412079, at *2.

[37] *Washington House Condo. Ass'n of Unit Owners*, 2017 WL 3412079, at *23 (emphasis added).

[38] *Bowles*, 1990 WL 35271, at *1.

Order is granted, and Defendant ESW's Motion to Dismiss Plaintiffs' Complaint is now denied.

II. MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS AGAINST DEFENDANT ENVIRONMENTAL STONEWORKS, LLC

Under the "American Rule" and settled Delaware law, litigants are generally required to pay their own legal costs.[39] However, an exception to this general rule exists "in contract litigation that involves a fee shifting provision."[40] When such a fee shifting provision is present, "a trial judge may award the prevailing party all of the costs it incurred during litigation."[41] The judge is also responsible for determining whether the requested fees are reasonable.[42]

Plaintiffs argue that they are entitled to an award of attorneys' fees and costs against ESW because "ESW's indemnity obligation has … been triggered by Plaintiffs' claims against the Settling Defendants, by ESW's 'negligent acts or omissions' in performing its Work, and by damage to property 'other than the Work itself,' as provided in the ESW Subcontract."[43]

In response, Defendants contend that the language of the indemnification provision in the ESW Subcontract is ambiguous, and any ambiguities must be

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[39] *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1218 (Del. 2013).
[40] *Mahani v. Edix Media Grp.*, 935 A.2d 242, 245 (Del. 2007).
[41] *Id.*
[42] *Id.*
[43] Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 12.

construed against the drafter, Daystar.[44] As construed against Daystar, Defendants believe the Subcontract's indemnification article requires the Court to make factual determinations that are not appropriate at this point in the litigation.[45] More specifically, Defendants argue that Plaintiffs' Fee Motion is premature because "no trier of fact has fixed liability or even made the factual findings necessary to trigger ESW's indemnity obligation under the contract."[46]

When interpreting a contract, "[t]he Court will [construe] clear and unambiguous terms according to their ordinary meaning. ... A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, an ambiguity exists '[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings."[47]

Additionally, an indemnity contract must be construed "to give effect to the parties' intent so that 'only losses which reasonably appear to have been intended by the parties are compensable' under the contract."[48] The Supreme Court of Delaware has held that, under Section 2704(a) of the Delaware Code, "a contractual provision requiring one party to indemnify another party for the second party's own negligence, whether sole or partial, 'is against public policy and is void and

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[44] Def. Resp. in Opp'n to Pls. Mot. for an Award of Att'ys' Fees and Costs ¶ 24.
[45] *See Id.* ¶¶ 25, 27.
[46] *Id.* ¶ 29.
[47] *GMG Capital Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).
[48] *St. Paul Fire and Marine Ins. Co. v. Elkay Mfg. Co.*, 2003 WL 139775, at *7 (Del. Super. Ct. Jan. 17, 2003) (quoting *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1165 (Del. 1978)).

unenforceable.'"[49] Section 2704(a) applies to "anyone in a subcontractor/contractor relationship in the construction context."[50]

The Court finds the language regarding indemnification in Article VII of the ESW Subcontract to be unambiguous. Article VII states in relevant part:

> To the fullest extent permitted by law, Subcontractor [ESW] shall indemnify and hold harmless the owner, Contractor, the project architect and agents and employees of any of them from and against claims, damages, lawsuits, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Subcontractor's Work provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of Subcontractor, Subcontractor's sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder*. ...
>
> The Subcontractor shall defend and bear all costs of defending any action or proceeding brought against Contractor or owner, or their officers, directors, agents and employees, successors or assigns, *arising in whole or in part out of any such acts or omissions* ...[51]

The indemnification provision was not meant to hold ESW financially responsible for the negligence of other parties, including that of Settling Defendants,

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[49] *J.S. Alberici Const. Co., Inc. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 521 (Del. 2000).
[50] *Id.*
[51] Pls. Mot. for an Award of Att'ys' Fees and Costs, Ex. A (emphasis added).

and the Court declines to hold otherwise here. Even if the Court found the Subcontract allowed Settling Defendants to be indemnified for their sole negligence, such a provision would be struck down for public policy reasons, as explained above.[52]

Instead, the Subcontract contains qualifying language that limits ESW's indemnification obligations to its own "negligent acts and omissions," even if partially caused by one of the parties to be indemnified. Similarly, ESW's duty to defend is limited to the same "acts and omissions," whether attributable to ESW "in whole or in part."[53] The Court interprets this language to mean that ESW only agreed to indemnify against its own sole or partially negligent acts and omissions.

Given its interpretation of the Subcontract, the Court agrees with Defendant that Plaintiffs' Motion for Attorneys' Fees and Costs is premature because there has been no fixed apportionment of fault among ESW and the Settling Defendants. Without such a determination, it is unclear which "acts or omissions" are the result of ESW's negligence and, consequently, what ESW is required to now indemnify Plaintiffs for, according to the terms of the Subcontract.

In light of the Court's decision on Plaintiffs' Rule 54(b) Motion, their Complaint against ESW can now move forward, and the litigation will resolve the

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[52] *See supra* footnotes 49-50 and accompanying text.
[53] Pls. Mot. for an Award of Att'ys' Fees and Costs, Ex. A.

factual issues needed to address ESW's indemnification obligations, if any, under the Subcontract. Therefore, Plaintiffs' Motion for an Award of Attorneys' Fees and Costs is denied.

CONCLUSION

For the reasons set forth in this Opinion, Plaintiffs' Rule 54(b) Motion for Revision of the Court's Interlocutory Order Dismissing Plaintiffs' Complaint against Defendant ESW is granted, and their Motion for an Award of Attorneys' Fees and Costs against ESW is denied.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.