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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF LEELANAU

JAMES and DARLYN DARATONY,

Plaintiffs

v

Case No. 95-3609-NZ
HON. PHILIP E. RODGERS, JR.

ROBERT L. BUMGARDNER BUILDER, Defendant/Counter-Plaintiff, MANITOU CUSTOM HOMES, INC., and F& L PAINTING, INC., jointly and severally,

Defendants,

and

WESTFIELD INSURANCE COMPANY,

Garnishee.
_____/

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_____/

DECISION AND ORDER
ON PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

The Plaintiffs' Motion for Summary Disposition on the garnishment action came before the Court for hearing on February 1, 1999, and the Court took the matter under advisement. The Court has reviewed the parties' briefs and entertained the arguments of counsel, and is otherwise fully advised in the premises. For reasons that will now be discussed, the Court denies Plaintiffs' motion and grants summary disposition for the Garnishee Defendant. MCR 2.517.

Introduction

The Plaintiffs contracted with the Defendant Bumgardner to build their vacation home north of Leland in Leelanau County. The home was destroyed by fire on November 30, 1994, just prior to its completion. The Plaintiffs thereafter discovered that the Defendant Bumgardner had failed to purchase a policy of insurance covering the Plaintiffs' real and personal property against fire loss. As a result, the Plaintiffs brought a lawsuit against Bumgardner Builder and two of its subcontractors. The lawsuit involved both negligence and breach of contract claims. The negligence action was dismissed by the Court.[1] The breach of contract case for the failure of Defendant Bumgardner to purchase a policy of insurance covering the loss was tried, and a verdict was returned in favor of the Plaintiffs.

The Plaintiffs subsequently filed a garnishment proceeding against Defendant Bumgardner's insurance carrier, Garnishee Westfield, for the amount of the judgment. Westfield denied any liability to Bumgardner. The Plaintiffs deposed Westfield's agent, Roger Wells, and filed a motion for summary disposition. The Plaintiffs contend that the original decision by Westfield to deny liability was based on "Mr. Wells' false understanding that this Judgment was related to the fire loss of the residence" rather than the breach of Bumgardner's promise to procure the insurance. They rely on Mr. Wells' deposition testimony in which Mr. Wells admits that money is property and that the Plaintiffs' financial loss from not having the promised insurance is a covered loss. Further, Mr. Wells testified that the subject loss does not fall within the scope of an exclusion in Bumgardner's comprehensive general liability policy.

In response, Westfield filed a brief and an affidavit of Roger Wells. In that response, Westfield contends that Exclusion 2b.(1) of the insurance policy "unambiguously excludes coverage for a breach of contract." Attached to its brief is an affidavit by Roger Wells which states that the judgment was based on an alleged breach of contract to procure fire insurance and the Westfield policy does not provide coverage for "any liability assumed in contract." Therefore, Westfield concludes that its policy of insurance does not cover the Plaintiffs' loss.

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[1]The Plaintiffs appealed the dismissal of the negligence claims. The decision of the trial court was affirmed on November 13, 1998 in a per curiam opinion. Court of Appeals # 202562.

In addition, at the oral argument, Westfield contended that there is no coverage for the breach of contract claim because a breach of contract is not an "occurrence" under the policy. "Occurrence" is defined as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In Plaintiffs' supplemental brief, they object to Westfield raising the "occurrence" argument at this late date.[2] Plaintiffs emphasize that during Mr. Wells' deposition, he expressly stated that coverage was denied because Westfield believed that the judgment fell within the purview of exclusions 2.b. and 2.j.(5). Plaintiffs assert that Westfield never determined that this loss was not a covered "occurrence." In fact, Plaintiffs argue that Westfield should be estopped to deny their claim was not an "occurrence" because Westfield admitted the breach of contract was an "occurrence" by relying on the exclusions. The exclusions, say Plaintiffs, do not become applicable unless there is an "occurrence."

I.

An insurance policy must be enforced in accordance with its terms. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). An insurance company is not liable for a risk it did not assume. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1991); *Kaczmarck v La Perriere*, 337 Mich 500, 60 NW2d 327 (1953).

There is no ambiguity where the terms of the contract are clear. *Churchman, supra* at 567, 489 NW2d 431; *Metropolitan Property & Liability Ins Co v DiCicco,* 432 Mich 656, 666; 443 NW2d 734 (1989), reh den with addenda to opinion 433 Mich 1202; 446 NW2d 291 (1989), citing *Edgar's Warehouse Inc v United States Fidelity & Guaranty Co*, 375 Mich 598; 134 NW2d 746 (1965); *Patek v Aetna Life Ins Co*, 362 Mich 292; 106 N2d 828 (1961); *Dimambro-Northend Ass'n v United Construction Inc*, 154 Mich App 306, 313; 397 NW2d 547 (1986); *Farm Bureau Mutual Ins Co v Hoag*, 136 Mich App 326, 332; 356 NW2d 630 (1984). Where there is no ambiguity, the terms of the contract will be enforced as written. *Stine v Continental Casualty Co*, 419 Mich 89,

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[2]The parties were given the opportunity to brief the "occurrence" issue after the oral argument to avoid any claim of surprise or lack of due process. The Court has reviewed all supplemental briefs.

114; 349 NW2d 127 (1984); *Murphy v Seed-Roberts Agency Inc*, 79 Mich App 1, 7-9; 261 NW2d 198 (1977). However, where an ambiguity exists, the policy will be construed in favor of the insured. *Auto Club Ins Ass'n* v *DeLaGarza,* 433 Mich 208, 214; 444 NW2d 803 (1989); *Powers v DAIIE*, 427 Mich 602, 624; 398 NW2d 411 (1986).

Furthermore, the terms of the contract must be interpreted in accordance with their "commonly used meaning," *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992); *Fireman's Fund Ins Co v Ex-Cell-O Corp*, 702 F Supp 1317, 1323, n 7 (ED Mich, 1988). The Court must take into account the reasonable expectations of the parties. *Vanguard Ins Co v Clarke,* 438 Mich 463, 472; 475 NW2d 48 (1991).

An insurance policy must be read as a whole to determine if it is ambiguous. An insured that intends to exclude coverage under certain circumstances should clearly state those circumstances in the section of its policy entitled "exclusions." *Transamerica Ins Corp of America v Buckley,* 169 Mich App 540; 426 NW2d 696 (1988). Any ambiguities will be liberally construed in favor of the insured party. *Calhoun v Auto Club Ins Assoc,* 177 Mich App 85; 441 NW2d 54 (1989).

The pertinent portions of the Westfield comprehensive general liability policy are as follows:

1. Insuring Agreement
   a. **We will pay those sums that the insured becomes legally obligated to pay as damages because of** "bodily injury" or **"property damage" to which this insurance applies**. . .

* * *

1.b. **This insurance applies** to "bodily injury" and "property damage" **only if**:
(1) The "bodily injury" or **"property damage" is caused by an "occurrence"** that takes place in the "coverage territory;" . . .

* * *

2. Exclusions
   This insurance does not apply to:
   a. "Bodily injury" or **"property damage" expected or intended from the standpoint of the insured**. . .

b. "Bodily injury" or **"property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement**. . .

9. **"Occurrence" means an accident**, including continuous or repeated exposure to substantially the same general harmful conditions."

* * *

12. **"Property damage" means:**
   a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
   b. **Loss of use of tangible property that is not physically injured.** All such loss shall be deemed to occur at the time of the "occurrence" that caused it. (Emphasis supplied.)

Initially, this Court must determine whether Plaintiffs have experienced a covered loss. The first issues to be resolved are whether the Plaintiffs' "property damage" was caused by an "occurrence."

"Occurrence" is defined in the policy as "an accident." In *Arco Industries v American Motorists Ins Co, et al*, 448 Mich 395, 404-405; 531 NW2d 168 (1995), the Michigan Supreme Court said:

> In recent times, there has been controversy over interpreting the term "accident." "Accident" has been difficult to interpret because it is sometimes not defined in insurance policies. See also *Auto Club Group Ins Co v Marzonie*, 447 Mich 624; 527 NW2d 760 (1994). When the meaning of a term is not obvious from the policy language, the "commonly used meaning" controls. Czopek, at 596, 489 NW2d 444.
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> In the instant case, the term "accident" is not defined by the AMICO policy. However, according to the common meaning of the term, it has been stated in *DiCicco* at 670, 443 NW2d 734, and *Marzonie* at 631, 527 NW2d 760, that "'an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.'" This definition is not disputed in the instant case. What is disputed is whether the definition of accident should be viewed from the standpoint of the insured or the injured party.
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> This Court has debated this issue in a number of previous cases. See *Frankenmuth Mutual Ins Co v Piccard*, 440 Mich 539; 489 NW2d 422 (1992), *Czopek*, and

Marzonie, supra. In *Marzonie,* this Court finally formed a majority on this issue holding that "accidents" are evaluated from the standpoint of the insured, not the injured person. See opinions of Justices Levin, Brickley, and Griffin, and Chief Justice Cavanagh.

The "occurrence" in the instant case was the fire. It was as a result of the fire that the Plaintiffs suffered a financial loss for which the Defendant Bumgardner became contractually liable. The policy requires only that there be "property damage" caused by an "occurrence" for which the insured "becomes obligated to pay." Nothing in the policy requires that the property damage be caused by the insured. The insured simply has to be "legally obligated to pay." In the instant case, the Defendant Bumgardner is "legally obligated to pay." See, *Dimambro-Northend Assoc v United Const Inc,* 154 Mich App 306; 397 NW2d 547 (1986).

In *DiCicco, supra,* the Court held that the existence of an "accident" must be addressed from the insured's viewpoint. Whether the insured was negligent or performed an intentional act is not determinative of whether the insured was aware that harm was to follow. Mere knowledge of potential danger does not equal knowledge of actual, intentional, expected harm. *Id,* at 709-710; 443 NW2d 734. Thus, in the instant case, we evaluate the "occurrence" from the standpoint of Bumgardner, not the injured Plaintiffs, to determine whether Bumgardner "intended or expected" to cause the Plaintiffs' loss.

No one alleges that Bumgardner intended to cause the destruction of the Plaintiffs' home by failing to procure the promised insurance. The fact that he knew it was possible for their home to be destroyed by fire is not enough to conclude that he intended or expected the loss to occur. *DiCicco, supra.* Whether Bumgardner's failure to procure the promised insurance was an act of negligence or an intentional act is irrelevant. He is "legally obligated to pay" within paragraph 1.b. of the insurance policy because the Plaintiffs' suffered a financial loss against which he failed to procure insurance.

Thus, absent an exclusion, the Westfield insurance policy does provide coverage for the Plaintiffs' property damage as it was occasioned by an event which would fall within the definition of an "occurrence." Next, however, the Court must determine whether this ostensible coverage has

been eliminated by a policy exclusion. If one of the exclusions applies, Westfield is not obligated to indemnify the Defendant Bumgardner.

II.

Westfield asserts exclusion 2.b. This exclusion states that the insurance does not cover "'property damage' for which the insured is obligated to pay damages by reason of the **assumption of liability in a contract or agreement.**" (Emphasis supplied). Westfield correctly states that the Defendant Bumgardner is obligated to pay damages because the jury found that he breached an oral contract with the Plaintiffs pursuant to which he agreed to procure builder's risk insurance. The question facing this Court is whether this oral agreement constitutes an excluded contractual assumption of liability as a matter of law.

An exclusion of liability insurance coverage for contractually assumed obligations to third parties is operative only where the insured would not have been liable to the third party absent the insured's agreement to pay. See, 63 ALR2d 1114, 1123 (1959), cited in *Lebow Assoc Inc v Avemco Ins Co,* 439 F Supp 1288, 1291 (ED Mich 1977). Lebow was followed in *School District for the City of Royal Oak v Continental Casualty Co,* 912 F2d 844 (6th Cir 1990) where the Court said:

> We cannot improve upon what Judge Charles Joiner, a distinguished Michigan jurist and teacher of law, said in *Lebow:*
>
> > A major rationale underlying the principle that assumed liability exclusion clauses are inoperative when the liability assumed is coextensive with the insured's liability imposed by law is that the insured's assumption of liability does not expand the insurance company's element of risk, upon which the insured's premium amounts are predicated, beyond the original contractual agreement of the parties. To allow an insurance company to avoid payment of its insured's liability to a third party, which otherwise exists by operation of law, merely because the insured contractually assumed the same liability to the third party would be to judicially condone a unilateral alteration of the substantive terms of the contract in favor of the insurance company on grounds which are not even relevant to the element of risk which underlies each parties' [sic] bargaining position. Such a result would undoubtedly be contrary to the reasonable expectations of the insured. *Id* at 1291.

See also, *Pinckney Community Schools v Continental Casualty Co,* 213 Mich App 521; 540 NW2d 748 (1995).

In *Lebow, supra,* there was a contractual indemnity agreement between two parties who were both insured by the same insurer. Because the indemnity agreement between the two insureds did not increase the insurer's obligation to pay, the Court held that the indemnity agreement did not fall within the "assumption of liability by contract or agreement" exclusion in the insurance contract.

In the *School District for the City of Royal Oak v Continental Casualty Co, supra,* a former teacher brought an action against the school district for religious discrimination which was prohibited by the teacher's collective bargaining agreement and by state and federal law. The Court held that the "assumption of liability by contract or agreement" exclusion in the school district's liability insurance policy did not apply because the school district's liability existed outside of the collective bargaining agreement provision prohibiting religious discrimination. It existed under both state and federal civil rights laws. The collective bargaining agreement did not affect the degree of risk the insurer bargained for when it insured the school district. Therefore, the school district's liability insurer was obligated to indemnify the school district.

According to *Couch on Insurance*, Section 129:30, Contract Liability Assumed by Insured, a typical contract exclusion clause (like exclusion 2.b. in the instant case) denies coverage generally assumed by a liability policy in cases in which the insured, in a contract with a third party, agrees to hold harmless or indemnify such third party. The purpose of this exclusion is to confine the coverage of the policy to the insured's tort liability and to avoid underwriting the insured's contractual undertakings. Such an exclusion generally refers to an insured's specific contractual assumption of other's tort liability as exemplified by an indemnity agreement requiring subcontractors to assume all negligence liability for a general contractor.

In the instant case, the Defendant Bumgardner became liable because he breached an oral promise to procure insurance on behalf of the Plaintiffs. The Defendant Bumgardner had no common law duty to buy insurance for Plaintiffs, and the original written contract required that Plaintiffs procure their own insurance. Once the Defendant Bumgardner made this oral promise and breached it, his obligation to pay Plaintiffs' damages arose by operation of contract law.

The above-cited authorities require this Court to assess the liability generated by the insured's contract with respect to the degree of risk originally underwritten by the insurer. If the contract extends the element of risk beyond the original insurance agreement, the exclusion applies. Thus, the general rule and its application have resulted in the exclusion being applied whenever the insured's contract subjects the insured to liability he would not otherwise have under a tort theory or by operation of law independent of the contract. See, *Lebow, supra*, where there was an express indemnity agreement but it did not affect the degree of risk undertaken by the insurer so that the exclusion was held not to apply. See also, *School District for the City of Royal Oak, supra*, where the exclusion was held not to apply because even though there was a contract between the parties, the basis of liability existed outside of the contract and *Pinckney Community Schools v Continental Cas Co,* 213 Mich App 521; 540 NW2d 748, 1995, where again the insured was liable to the third party regardless of the existing contract so the exclusion did not apply.

The question to be answered, therefore, is whether the Defendant Bumgardner's oral promise to procure fire insurance created a liability risk beyond those to which he was already exposed as a matter of statutory law or common law duty and beyond those which would have been contemplated by the parties at the time that Westfield issued the policy of comprehensive general liability insurance. With the conclusion of the trial in the underlying case, it is now undisputed that the Defendant Bumgardner is **only** liable for the Plaintiffs' loss because he breached his oral contract with the Plaintiffs to procure fire insurance. Liability arose solely out of that oral contract.[3] No co-existent statutory or common law obligation would have generated the same liability risk. Thus, the Defendant Bumgardner's liability to the Plaintiffs arises solely out of the contract and was not within the contemplation of the parties when the comprehensive general liability policy was issued. The Defendant Bumgardner's assumption of additional contractual liability extends the risk Westfield assumed. Therefore, the "assumption of liability by contract or agreement" exclusion is applicable.

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[3]Indeed, the parties written agreement required the Plaintiffs to procure the requisite insurance. The oral agreement was a subsequent modification of a written document supported by consideration and upon which the jury found the Plaintiffs relied to their detriment.

Conclusion

It is this Court's conclusion that Plaintiffs experienced property damage as the result of an occurrence but that coverage was excluded by exclusion 2.b. "assumption of liability by contract or agreement" of the Westfield policy. The Defendant/Garnishment Plaintiff Bumgardner's Motion for Summary Disposition should be and hereby is denied. Summary disposition in favor of Garnishee Westfield is granted pursuant to MCR 2.116(I)(2), and this case is dismissed with prejudice.

This Decision and Order is final and disposes of all issues in this case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/08/99