

13-0931

IN THE CIRCUIT COURT OF KANAWHA COUNTY OF WEST VIRGINIA

FILED


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CATHY S. BAISEN, CLERK
KANAWHA COUNTY CIRCUIT COURT

BARRY G. EVANS and ANN M. EVANS,

Plaintiffs,

v.

**Civil Action No. 11-C-606
Honorable Judge James C. Stucky**

**CMD PLUS, INC., a West Virginia corporation,
C. K. SHAH, CHANDRAKANT N. SHAH, and
KIMBERLY S. SHAH,**

Defendants.

and

CMD PLUS, INC., a West Virginia corporation,

Third-Party Plaintiff,

v.

**STATE AUTO PROPERTY INSURANCE COMPANIES
d/b/a State Auto Property and Casualty Insurance
Company, an Ohio Company,**

Third-party Defendant

and

STATE AUTO PROPERTY AND CASUALTY INSURANCE COMPANY,

Intervenor.

FINAL ORDER

The Court has before it a motion regarding insurance coverage issues raised by Intervenor State Auto Property and Casualty Insurance Company ("State Auto") in the "Intervenor State Auto Property and Casualty Insurance Companies Amended Motion for Declaratory Judgment" ("State Auto's Motion"). The issues have been fully briefed. On April 1, 2013, all of the parties appeared, by their respective counsel, for a hearing at which the Court entertained oral argument. As was argued at the hearing in this

matter, very little discovery has been conducted in the underlying case. Upon consideration of all of the foregoing, State Auto's Motion is hereby **DENIED**. The Court now enters the following order setting forth findings of fact and conclusions of law:

FINDINGS OF FACT

1. At all times relevant herein, CMD Plus Inc. ("CMD") is and was a West Virginia corporation engaged in the business of development and construction activities with its principal place of business located at 204 Pembroke Square, Charleston, West Virginia 25314.

2. At all times relevant herein, CMD maintained a policy of insurance, more specifically the Commercial General Liability Insurance Policy No. SPP 2382380 03, issued by State Auto which provided insurance coverage up to the policy limit of One Million Dollars (\$1,000,000.00) (the "Insurance Policy").

3. Prior to March 9, 2009, CMD entered into a contractual agreement with the co-defendants in this action, C.K. Shah and Kimberly S. Shah (hereinafter "the Shahs"), to allow CMD to construct a custom home on real property owned by the Shahs located on Meadow Road in Charleston, Kanawha County, West Virginia, described as "99/100 A Lts 28, 35 & 38 Highland Meadows Sec. C Phase 2, Joplin Br." (the "Shah Property").

4. Prior to March 9, 2009, with the express consent and agreement of the Defendants the Shahs, CMD entered into a contract with James D. Jackson, II and April Jackson by which CMD contractually agreed to construct a custom home on the Shah property for the Jacksons.

5. At all times relevant herein, the Plaintiffs in the underlying action, Barry G. Evans and Ann M. Evans ("the Plaintiffs"), owned the adjacent property to the Shah Property located at 1128 Shamrock Road, Charleston, Kanawha County, West Virginia (the "Evans Property").

6. As alleged in the Plaintiffs' Complaint, on or about March 9, 2009, the Plaintiffs allege that the construction activity on the Shah Property caused surface water, storm water, mud and debris to escape the Shah Property and enter the Evans Property ("alleged incident").

7. In April 2011, the Plaintiffs filed suit against CMD and the Shahs alleging nuisance, trespass, and negligence. Specifically, in their Complaint, the Plaintiffs allege the following:

5. Beginning in the Spring 2009 and continuing to the present, Defendants have engaged and continue to engage in activities on the Shah property which has disturbed the surface of the Shah property and caused surface water, storm water, mud and debris to escape the Shah property and to inundate the Evans property.

6. Defendants' activities on the Shah property are the sole and proximate cause of the escape of surface water, storm water, mud and debris from the Shah Property onto the Evans property.

21. Defendants' negligent and careless acts and omissions proximately caused and continued to proximately cause injury and damage to the Evans Property and to Plaintiffs.

8. In essence, the Plaintiffs are asserting claims for property damage as a result of the alleged negligence of CMD.

9. The Insurance Policy is one of the insurance policies implicated by the Plaintiffs' claims.

10. State Auto contends that the Insurance Policy affords no coverage to CMD Plus and Mr. Shah for the Plaintiffs' claims. Specifically, State Auto argues that "[t]he Plaintiffs [the Evanses] are. . .seeking damages to perform a repair, restoration or enhancement of the property owned by the Defendants by way of a pile and lagging wall being placed on the Shah property at 6 Meadow Road, Charleston, West Virginia." See *State Auto's Motion*.¹

11. Specifically, State Auto points to the following policy language to support its claim of no coverage under the policy:

SECTION IV-COMMERCIAL GENERAL LIABILITY CONDITIONS

17. "Property Damages" 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 of use shall be deemed to occur at the time of the "occurrence" that caused it.

SECTION V- DEFINITIONS

22. "Your work":

- a. Means:
 - (1) Work or operations performed by you or on your behalf; and
 - (2) Materials, parts or equipment furnished in connection with such work or operations.

¹ "Memorandum of Law in Support of Intervenor State Auto Property and Casualty Insurance Company's Motion for Declaratory Judgment" is referenced as "State Auto's Motion".

- b. Includes
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
 - (2) The providing of or failure to provide warnings or instructions.

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COMMERCIAL GENERAL LIABILITY COVERAGE FORM
SECTION 1 – COVERAGES

- 2. Exclusions
This insurance does not apply to:

- j. **Damage to Property**

"Property damage" to:

- (1) **Property you own**, rent Or occupy, including any costs or expenses incurred by you, or any person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, including prevention of injury to a person or damage or another's property;

CONCLUSIONS OF LAW

1. State Auto seeks a declaration of its rights and obligations under its insurance contract with CMD Plus, Inc. and C.K. Shah. West Virginia's Uniform Declaratory Judgment Act, W. Va Code § 55-13-1, *et seq.*, provides that the Circuit Court has the power to declare the rights, status and other legal relations whether or not further relief is or could be claimed and such declarations shall have the force and effect of a final judgment or decree. The interpretation of an insurance contract is a legal determination. *Payne v. Weston*, 195 W. Va. 502, 506-7, 466 S.E.2d 161, 165-66 (1995).

2. As the Plaintiffs in this matter seek property damages as a result of the alleged negligence of CMD, the applicable Insurance Policy provides coverage for the claims made in this civil-action.

3. The Court finds that none of the exclusions cited by State Auto served to exclude coverage for the claims of the Plaintiffs.

4. The West Virginia Supreme Court of Appeals has held that CGL policies of insurance do not provide protection for poor workmanship; instead these policies protect an insured from liability due to personal injury or property damage to other caused by the insured's negligence. *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 511-512, 526 S.E. 2d 28, 33-34 (1999). In this case, the Plaintiffs are third-parties alleging that the negligence of another party (i.e. CMD) has caused them property damages. This is the *exact type* of damage that the Insurance Policy is intended to cover per West Virginia law.

5. "Your work" exclusions only preclude coverage for liability for repairing or replacing the insured's own defective work; the exclusion does not exclude coverage for damage to other property resulting from the defective work. See, e.g. *Wilshire Ins. Co. v. RJT Const. LLC*, 581 F.3d 222 (2009). The damages in this case are alleged to have occurred on the Plaintiffs' property and there has been no allegation that any "work" of CMD must be repaired or replaced.

6. With regard to "own, rent or occupy" exclusions, its purpose is to prevent liability insurance from operating as casualty insurance for damage *to the insured's own property*. Such exclusion was not intended to exclude coverage for the insured's liability to third-parties. See, e.g. *Porter v. Clarendon Nat. Ins. Co.*, 76 Mass.App.Ct. 655

(2010); *Rubenstein v. Royal Ins. Co. of America*, 694 N.E.2d 381 (1998); *Massachusetts Bay Ins. Co. v. Ferraiolo*, 584 A2d 608 ME (1990). In this case, the alleged damage caused by the nuisance and trespass was to a third-party's property, not the property of the insured. Further, as stated, the Plaintiffs are not seeking to compel, "repair, replacement, enhancement, restoration or maintenance" of CMD's property.

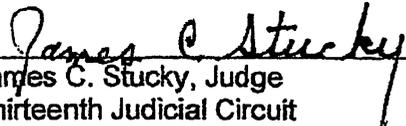
7. Despite the intention of such a clause, the overwhelming weight of authority favors coverage for such repair/remediation expenses under liability policies for remediation expenses incurred in connection with an insured's own property, notwithstanding an owned property exclusion, when the concern is primarily addressed to the premises of a third party. *See, e.g., Aetna Ins. Co. v. Aaron*, 112 Md.App. 472 (1996); *Intel Corp v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551 (9th Cir.1991); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2nd Cir.1991); *South Carolina Ins. Co. v. Coody*, 813 F. Supp. 1570 (M.D.Ga.1993); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 788 F.Supp. 846 (D.N.J.1992); *Claussen v. Aetna Cas. & Sur. Co.*, 754 F.Supp. 1576 (S.D.Ga. 1990); *Boyce Thompson Inst. for Plant Research, Inc. v. Insurance Co. of North America*, 751 F.Supp. 1137 (S.D.N.Y.1990); *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F.Supp. 35, 40-41 (D.Mass.1989); *City of Edgerton v. General Cas. Co. of Wisconsin*, 172 Wis.2d 518, 493 N.W.2d 768 (1992).

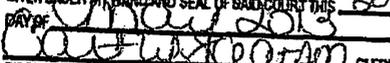
8. In sum, the Insurance Policy issued by State Auto provides coverage to CMD in this case.

WHEREFORE, for all the foregoing reasons, this Court ORDERS that State Auto Property and Casualty Insurance Company's Motion for Declaratory Judgment and Summary Judgment is hereby DENIED.

The Clerk is directed to send a certified copy of this Order to all counsel of record, and this matter is ORDERED to remain on the active docket of the Court as to all parties.

ENTERED this 17th day of May, 2013.


James C. Stucky, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21st
DAY OF May 2013

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA