

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 12, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

NAABANI TWIN STARS, LLC; TWIN
STARS, LTD.,

Plaintiffs - Appellants,

v.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant - Appellee,

and

TRAVELERS COMPANIES, INC.,

Defendant.

No. 20-2168
(D.C. No. 1:19-CV-00197-RB-JFR)
(D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and
MATHESON, Circuit Judge.

In 2016, a building owned by Naabani Twin Stars, LLC and Twin Stars, Ltd. was damaged by an underground water pipe. Twin Stars hired two geotechnical consultants to assess the cause and extent of the damage. Both consultants agreed the water from the burst pipe caused soil compression and settlement, which in turn

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

caused the damage to the building—cracks in the floor, buckling of the exterior, breaking of sheetrock, the inability to close and open doors, significant distortions of the structural frame, broken welds in the steel framing, and pressure on the fire suppression lines.

Twin Stars filed a claim with its insurer, St. Paul Fire & Marine Insurance Company, based on its all-risk and additional coverages policies. St. Paul performed its own assessment of the building and later denied coverage for the loss because (1) there was no collapse as defined in the policy, and (2) the “earth movement” exclusion applied.

Twin Stars sought declaratory judgment in New Mexico state court, and St. Paul removed the case to New Mexico District Court and moved for summary judgment. The district court granted summary judgment to St. Paul and dismissed Twin Stars’s claims for coverage of its losses and alleged bad faith.

Twin Stars argues on appeal that the district court erred in finding (1) there was no collapse as defined by the policy, (2) the earth movement exclusion precluded any coverage for either the all-risk policy or the additional coverages, and (3) St. Paul did not act in bad faith in either its investigation of the damage or denial of coverage. We have reviewed the record de novo, and for substantially the same reasons as the district court’s Order, we affirm the grant of summary judgment in favor of St. Paul.

The definition of collapse in the policy was unambiguous, and the damage to the building was excluded by the definition. No parts of the building either “fell

down” or “caved in.” At most, the building suffered damage that was explicitly excluded by the definition.

But even if the building had suffered a collapse, coverage would have been precluded by the earth movement exclusion.¹ Twin Stars’s two consultants agreed the damage to the building was caused by soil compression and settlement, which is excluded from coverage by the earth movement exclusion: “We won’t cover loss caused . . . by any earth movement . . . including . . . [e]arth sinking, rising, or shifting, including soil conditions which cause settling, cracking, or other disarrangement of foundations or other parts of realty.” App., Vol. I at 85. And “soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil, and the action of water under the ground surface.” *Id.* at 86. Because soil conditions caused a shift in the building, which in turn caused the damage at hand, coverage is precluded by the policy’s exclusion.²

¹ Twin Stars argues the anti-concurrent causation clause in the policy, which excludes coverage “regardless of any other cause or event that contributes concurrently or in any sequence to the loss[,]” App., Vol. I at 85, should be abrogated in favor of the efficient proximate cause, the water leak. In other words, Twin Stars seeks to render the earth movement exclusion inapplicable because the damage was also caused by the water from the broken pipe. We need not reach this issue because we conclude the earth movement exclusion unambiguously applies.

² Twin Stars contends the additional coverages are not subject to the policy exclusions, so the collapse coverage should not be subject to the earth movement exclusion. That is incorrect. The exclusions apply to both the all-risk policy and additional coverages. Although there is no general policy term explicitly stating so, we can infer the exclusions are applicable to the entire policy because some exclusions specifically state they are inapplicable to certain additional coverages. For example, collapses are specifically excluded from coverage. “We won’t cover loss caused by or resulting from collapse.” App., Vol. II at 318. But the exclusion

Finally, Twin Stars did not provide sufficient evidence to demonstrate that St. Paul acted in bad faith.³ Twin Stars alleges St. Paul acted in bad faith when it refused to investigate the damage further even though St Paul's adjuster noted that additional investigative measures could have given them a better idea of the effect the leak had on the building. Aplt. Br. at 29. But Twin Stars fails to demonstrate what would have changed had St. Paul investigated further. At best for Twin Stars, St. Paul would have concluded the July 2016 leak caused the soil movement that caused the damage. That best case conclusion for Twin Stars is exactly what Twin Stars's own consultants concluded (and it is the same presumption St. Paul relied on in denying coverage). Whether the damage was caused by gradual soil movement or by abrupt soil movement because of the July 2016 leak changes nothing; damage from either is precluded by the earth movement exclusion. Because Twin Stars fails to demonstrate what else St. Paul could have done to properly investigate the damage, we conclude St. Paul did not act in bad faith.

goes on to say that "this exclusion doesn't apply to the Collapse additional coverage." *Id.* at 319. This indicates that exclusions apply to additional coverages unless specifically disclaimed. Otherwise, the disclaiming language in the exclusions would be superfluous.

³ Whether a claim for bad faith can survive when there is no underlying coverage is an open question in New Mexico. We do not purport to answer it here. Even assuming for purposes of argument that a claim for bad faith investigation can survive without underlying coverage, Twin Stars fails to raise enough evidence of bad faith to survive summary judgment.

The judgment of the district court is AFFIRMED.

Entered for the Court

Timothy M. Tymkovich
Chief Judge