NOT DESIGNATED FOR PUBLICATION

ROBERT MAUREAU	*	**NO. 2000-CA-1915**
VERSUS	*	**COURT OF APPEAL**
CALMAR CORPORATION	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-621, DIVISION "C-6"
HONORABLE ROLAND L. BELSOME, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr. and Judge David S. Gorbaty)

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AMENDED AND, AS AMENDED, AFFIRMED

This matter arises from allegations by the plaintiff, Robert Maureau ("Maureau"), against the defendant, Calmar Corporation ("Calmar"), of improper and/or inadequate clean up of a job site. Maureau and Calmar executed a contract for the installation of spray-on insulation at premises owned by Maureau. The contract specifically provided for clean up of the job site. Following completion of the work, a stain remained in the parking lot that could not be removed. Maureau brought suit against Calmar for breach of contract. Calmar submitted the suit to its insurer, Zurich Insurance Company ("Zurich"), for defense. Zurich denied coverage and refused to indemnify or defend Calmar. Calmar then filed a third party demand against Zurich, alleging that Zurich's denial of coverage and refusal to indemnify and defend was a breach of the policy of general commercial liability insurance issued by Zurich.

Calmar devolutively appeals the trial court's granting of summary

judgment in favor of Zurich on the issues of coverage and the duty to indemnify and defend under the policy. Calmar raises two assignments of error:

1. "Trial Court committed legal error when it found that the Third Party Defendant-Appellee did not have a duty to defend Third Party Plaintiff-Appellant in the main claim."

2. "Trial Court committed legal error when it found that Third Party Plaintiff-Appellant was not afforded coverage under the subject insurance policy."

We find that the trial court correctly concluded that no genuine issue of material fact existed between the parties and that judgment should enter as a matter of law in favor of Zurich.

Maureau styled its lawsuit as a "Suit in Breach of Contract" and the allegations contained therein are carefully couched in terms of Calmar's contractual obligations. However, Calmar maintains that, despite the wording of Maureau's petition, the allegations contained therein "appear as a tort." Calmar argues that Zurich was required to look beyond the wording of Maureau's allegations to the actual facts being pled. Calmar further maintains that Zurich at least owes it a defense until such time as the issues of coverage and/or prescription are addressed in a full evidentiary hearing by the trial court. Calmar relies upon the general coverage language of the policy which provides:

SECTION I – COVERAGES
COVERAGES A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

4. 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. . .
    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".

* * * * *

SECTION V – DEFINITIONS

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

Calmar contends that the stain in the parking lot was the result of an accident and, thus, an "occurrence" within the coverage terms of the policy.

By contrast, Zurich relies on the explicit wording of the petition setting forth a claim for breach of contract and the clear and unambiguous policy language excluding same. The pertinent exclusionary policy language upon which Zurich relies provides as follows:

SECTION I – COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

3. Exclusions.

This insurance does not apply to:

c. "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. This exclusion does not apply to liability for damages:

(1) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
(2) The insured would have in the absence of the agreement or contract.

j. "Property damage" to:

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operation, or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

SECTION V – DEFINITIONS

6. "Insured contract" means:

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person

> or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

An insurer is obligated to defend its insured regardless of the outcome of the case if, assuming the plaintiff's allegations are true, there is both coverage under the policy and liability to the plaintiff. *Cute'-Togs of New Orleans, Inc. v. Louisiana Health Services and Indemnity Company,* 386 So.2d 87 (La. 1980). Unless plaintiff's petition unambiguously excludes coverage, the insurer is under a duty to defend its insured. *Id.* In the case at bar, the plaintiff's petition alleges only a breach of contract. At no point does the plaintiff refer to any duty or breach of duty in tort. It is understandable as to why the plaintiff so carefully worded its petition, given that the suit was filed more than a year after completion of the work. The allegations of the petition seek a recovery only for the alleged breach of duties arising from the contract.

In *Cute'-Togs*, the Supreme Court of Louisiana reversed the appellate court on a substantially similar issue. *Cute'-Togs* involved a suit between Cute'-Togs and Blue Cross, its health care provider, for Blue Cross's alleged failure to process the application for coverage of one of Cute'-Togs's

employees. As a result, that employee quit when he could not obtain medical coverage for his wife's hospitalization. Cute'-Togs sued Blue Cross for the loss of a skilled employee. Blue Cross filed a third party demand against its liability insurer, Aetna, contending that Aetna had a duty to defend it. Aetna denied coverage on the basis of policy language specifically excluding coverage for any "delay in or lack of performance . . . of any contract or agreement." The court of appeal relying on these allegations held that, since negligence was not specifically excluded as grounds of non-defense, Aetna was obligated to defend Blue Cross. However, the Supreme Court of Louisiana reversed that holding, stating :

> This reasoning overlooks the source of Cute'-Togs alleged damages. **According to the allegations of plaintiff's petition**, the duty/right relationship between the parties arose out of the insurance agreement between them, and the allegations of plaintiff's petition allege no more than a negligent failure of that duty.

Id. at 89 (Emphasis added.) The Supreme Court reiterated its established position regarding the "duty to defend" rule, citing *American Home Assurance Co. v. Czarniecki*, 255 La. 251, 230 So.2d 253 (1969), as follows:

> ". . . the insurer's duty to defend suits brought against its insured is **determined by the allegations of the injured plaintiff's petition**, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage. . . "

Id. (Emphasis added). Our jurisprudence is consistent in holding that the obligations of an insurer to its insured are determined by looking to the face of the pleadings against the insured and the provisions of the policy.

Although we are mindful of the problems associated with a plaintiff being able to control the defense in this way, we are likewise aware that a plaintiff is the architect of the suit and may make any claim or seek whatever type of damages it believes it can prove. In the matter at bar, Maureau seeks only to recover for a breach of contract. At this point, Calmar is not entitled to a defense from Zurich as the policy language clearly and unambiguously excludes coverage relating to a breach of contract.

Inasmuch as discovery is incomplete and our law envisions the liberal amendment of pleadings, the trial court erred to the extent that it rendered its judgment dismissing Zurich "with prejudice". If the plaintiff amends the petition to state a cause of action falling within the purview of negligence, Zurich may once again be made a third party defendant. The issues of coverage and duty to defend may then be re-urged.

Accordingly, for the above reasons, the decision of the district court is amended to dismiss Calmar's claims against Zurich "without prejudice", and

is affirmed as amended, each party to bear its respective costs of this appeal.

AMENDED AND, AS AMENDED, AFFIRMED.