STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1861

Owners Insurance Company,
Respondent,

vs.

Equal Access Homes, Inc.,
Defendant,

Robert Bach, et al.,
Appellants.

Filed May 28, 2013
Affirmed
Stauber, Judge

Dakota County District Court
File No. 19HACV115738

Timothy Tobin, Allison M. Lange Garrison, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondent)

David L. Hashmall, Matthew D. Schwandt, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota; and

Margo Brownell, Jesse Mondry, Insurance Law Clinic, University of Minnesota Law School, Minneapolis, Minnesota (for appellants)

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

This is an appeal from summary judgment in favor of respondent insurer in a declaratory-judgment action, in which the district court ruled that respondent's commercial general liability policy (CGL) does not cover damages awarded to appellants in an arbitration proceeding against respondent's insured. Appellants argue that the district court erred in ruling that (1) there was no "occurrence" within the meaning of the CGL policy and (2) the damages to appellant's house did not constitute "property damage" within the meaning of the CGL policy. Appellants and respondent also ask this court to rule on issues not reached by the district court. We affirm without reaching issues not decided by the district court.

FACTS

In December 2001, appellant spouses Robert Bach and Karen Gunderson entered into a contract with respondent Owner's Insurance Company's (Owners) insured, Equal Access Homes, Inc. (EAH), for the construction of an accessible house in Inver Grove Heights for appellants and their daughter, who uses a wheelchair. EAH served as general contractor for the project. Following completion of the construction plans, EAH and appellants agreed to two major design changes. First, heavier natural stone, rather than lighter synthetic stone, would be used for the fireplace in the kitchen/family room area, which required additional support for the heavier load. Second, the heating, ventilation, and air conditioning (HVAC) ductwork for the swimming pool would be rerouted to the ceiling of the basement. EAH, aided by its subcontractors, completed construction in

July 2002, and the city issued a temporary certificate of occupancy; appellants took occupancy of the house in August 2002 and closed on it on September 1, 2002.

In late 2002, appellants first identified floor-truss issues. On December 17, 2002, a city building official investigated and observed excessive deflection (sagging) in the floor near the stone-clad fireplace along with improper alignment of a basement support wall that EAH installed. Because EAH and appellants could not agree on the extent of the repair work, appellants hired a contractor to engineer and perform the repairs necessary to support the fireplace.

Other structural defects were also identified. EAH's framing subcontractor failed to install a structural support column called for in the original construction plans, a serious structural flaw that caused significant sagging in the floor and substantial deflection of the central beam. The framing subcontractor also installed undersized microlams and failed to install truss strongbacks, both of which were intended to provide additional support. On October 16, 2003, the city issued a correction notice to EAH, which required it to address these structural flaws, level the floors, and obtain certification of the repairs by an engineer before the city would issue a permanent certificate of occupancy.

When appellants and EAH were still unable to agree about repairs, appellants commenced an arbitration action against EAH in July 2004. Owners defended EAH under a reservation of rights. In 2009,[1] a company hired by appellants inspected the

[1] Appellant's efforts to repair the house were put on hold while they addressed family issues and searched for an engineer who could address the structural problems.

house and recommended a comprehensive scope of repair. Appellants obtained bids from two companies to perform the repairs, and EAH obtained one, the lowest bid of the three. An arbitration hearing was held in May 2011, and the arbitrator issued an award in favor of appellants. The arbitrator found that the structural failures occurred because EAH and its subcontractors performed the work negligently, in breach of contract, and in violation of Minn. Stat. §§ 327A.01-.08 (2002), the Housing and Home Improvement Statutory Warranties Act. The arbitrator also found that the proposed repairs would correct all of the major structural issues and permit the issuance of a certificate of occupancy, and the selected bid was the lowest reasonable bid. The arbitrator awarded appellants a total of $308,553.41, which included the cost of reports and repairs, relocation costs, and attorney fees under the parties' contract. The arbitrator further ruled that the arbitration expenses were to be borne by EAH.

Shortly after the arbitration award was issued, Owners commenced this declaratory-judgment action, seeking a ruling that its CGL policy did not provide coverage for any portion of the arbitration award and/or that several "business-risk" exclusions applied. It further asserted that even if some of appellants' claims fell within the scope of coverage, it is not required to pay any portion of the arbitration award because the award failed to distinguish between covered and non-covered claims. Appellants counterclaimed, seeking a declaration that the damages awarded was covered, that no exclusions applied and that the award adequately distinguished between covered and non-covered claims as required.

Both parties moved for summary judgment. The district court granted Owner's motion for summary judgment, ruling that appellants failed to demonstrate that they suffered property damage caused by an occurrence under the policy. The court did not address whether any exclusions applied or whether the arbitration award sufficiently distinguished between covered and non-covered items. This appeal followed.

D E C I S I O N

A motion for summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On an appeal from summary judgment, a reviewing court will ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

Insurance-coverage issues and the interpretation of policy language are questions of law that we review de novo. *Jenoff, Inc. v. N.H. Ins. Co.*, 558 N.W.2d 260, 262 (Minn. 1997). When interpreting insurance policies, this court applies general principles of contract interpretation. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). "When the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning." *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002).

"[A]n insurer has a duty to indemnify when its insured is found liable for a third-party claim within the terms of the liability insurance policy, but an insurer has no duty to

indemnify when its insured is found liable for a third-party claim that is outside the policy's scope." *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 616 (Minn. 2012). "The insured bears the initial burden of proving prima facie coverage of a third-party claim under a liability insurance policy." *Id.* at 617. If this burden is met, "the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense." *Id.* In analyzing these issues, "the court examines the language of the particular policy and the claim or claims actually proven by the third–party claimant in the liability action against the insured." *Id.*

The CGL policy requires Owners to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." Under the policy, property damage is covered only if it is caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *See Black's Law Dictionary* 1185 (9th ed. 2009) (defining "occurrence" as "[s]omething that happens or takes place; specif[ically], an accident, event, or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party.") While "accident" is not defined in the policy, the supreme court's long-standing definition of the term is "an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." *Remodeling Dimensions*, 819 N.W.2d at 611; *see also Black's Law Dictionary*, *supra*, at 16 (defining accident as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated").

In determining whether property damage resulted from an "accident," "lack of specific intent to injure will be determinative, just as it is in an intentional act exclusion analysis." *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 612 (Minn. 2001); *see Remodeling Dimensions*, 819 N.W.2d at 611 (stating, in the context of a claim for moisture damage resulting from continuous or repeated exposure to water intrusion into the house, that negligent construction claims, if proven, could satisfy the meaning of "occurrence" under the policy). But "[a] contractor who knowingly violates contract specifications is consciously controlling his risk of loss and has not suffered an occurrence." *Bituminous Cas. Corp. v. Bartlett*, 307 Minn. 72, 79-80, 240 N.W.2d 310, 314 (1976), *overruled on other grounds by Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 391 (Minn. 1979).

Appellants challenge the district court's ruling that the conduct by EAH and its subcontractors was intentional because the arbitrator, as finder of fact, explicitly found the structural deficiencies were the result of negligence by EAH and its subcontractors. We are not persuaded. First, the arbitrator also found that EAH and its subcontractors breached their construction contract and performed their work in violation of the standards established by Minn. Stat. §§ 327A.01-08. As the court observed, the uncontroverted facts demonstrate EAH's intentional failure to meet contract specifications and industry standards when it constructed the floor support system.

Second, the district court noted that under *Bituminous* "[p]oor workmanship alone cannot establish an 'occurrence' – especially where the insured intentionally ignored known constructions standards or failed to follow construction plans and specifications."

The district court reasoned that where modifications to the original construction plans necessitated numerous changes, some of which were poorly done and others which were not done at all, leading to damages to the flooring system, the result was not accidental. Instead, "this was a foreseeable, direct and natural consequence of faulty construction work in breach of contract with" appellants. We agree.

The district court ruled that EAH knew or should have known, through its voluntary and intentional design changes and poor workmanship, that it was substantially probable that the floor system would fail, causing the floors to sag. *See Bituminous*, 307 Minn. at 79, 240 N.W.2d at 313-14 (concluding that insured should have expected property damage after installing chipped bricks and building out-of-plumb walls). The district court correctly held that "EAH's intentional failure to meet contract specifications and industry standards . . . resulted in the highly foreseeable consequence of injury to components of the floor support system, as evidenced by the deflecting floors," so that as a matter of law, there was no occurrence under the policy.

In conclusion, we reiterate that the general contractor is responsible by contract for performing in a good and workmanlike manner, satisfying not only its contract but also the building regulations and codes. *See id.* at 79-80, 240 N.W.2d at 314 (holding that "[a] contractor who knowingly violates contract specification . . . has not suffered an occurrence"). When, as here, the damages are not due to an accident, we decline to equate a breach of contract (or "shoddy workmanship" as the district court called it) with an "occurrence." The CGL policy at issue does not cover poor workmanship and/or errors and omissions that occurred; instead the remedy was on the contract, which, in this

case, required arbitration. Expansion of the interpretation of "occurrence" would convert a CGL policy into a "guaranty" of contractor performance, which is exactly what the insurance industry has tried to avoid. Further, EAH knew it was purchasing an insurance policy, not a performance bond, as does every contractor.

In light of the fact that appellant's damages were not covered by an "occurrence," we find it unnecessary to reach the issue of whether the damage constituted "property damage" within the meaning of the policy. The parties also urged this court to address whether various policy exclusions applied and whether the arbitration award sufficiently distinguished between the types of damages awarded, issues that the district court did not reach; likewise it is unnecessary for this court to address these issues.

Affirmed.