IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AE-NEWARK ASSOCIATES, L.P. and AE-NEWARK, INC.,	)	
Plantiffs,	)	
v.	)	**C.A. No. 00C-05-186 JEB**
CNA INSURANCE COMPANIES	)	**DECLARATORY JUDGMENT**
and TRANSCONTINENTAL INSURANCE COMPANY,	)	**(Per 10 Del. C. § 6501 et seq.)**
Defendants.	)	

Submitted: March 5, 2001
Decided: October 2, 2001

Plaintiffs' Motion for Declaratory Judgment - **GRANTED**

OPINION

Appearances:

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Attorney for Plaintiffs

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Attorney for Defendants.

JOHN E. BABIARZ, JR., JUDGE.

This case relates to the interpretation of a commercial liability insurance policy. The parties have submitted the case to the Court for a decision on the merits Plaintiffs assert that under the insurance policy at issue, they are entitled to coverage by the Defendants for damages arising from the installation, replacement, and repair of a faulty roof system. Defendants argue that such coverage is excluded by the insurance policy. Because the damages were caused by a subcontractor, and subcontractors are specifically exempted from the "property damage" exclusion in the policy, Plaintiffs' motion for a declaratory judgment is **GRANTED**.

I. FACTS

Plaintiff AE-Newark Associates, L.P. is a Delaware limited partnership for which AE-Newark, Inc. is the general partner (together, "Plaintiffs"). Defendant Transcontinental Insurance Company is a subsidiary of Defendant CNA Insurance Companies (together, "Defendants").

On February 1, 1994, and July 26, 1994, Plaintiffs contracted with Delco Roofing Company, Inc. and Delco Siding & Gutter, Inc. ("Delco") to remove, install, replace, repair, re-roof and modify fourteen buildings in a complex owned, operated and managed by Plaintiffs known as the Apartments at Pine Brook in Newark, Delaware.

The roofs installed by Delco developed water leaks that caused extensive damage to Plaintiffs property and to the personal property of Plaintiffs' tenants.

The roofing system installed by Delco was manufactured, designed and engineered by Johns Manville International, Inc. ("Manville").

Defendant CNA provided an insurance policy, written through Defendant Transcontinental, to Delco for commercial liability.

Defendants disclaim any commercial liability coverage to Delco for the faulty roof system, claiming that the losses are excluded from the policy because the damage resulted from Delco's own work.

On February 10, 1998, Plaintiffs filed a complaint in this Court against Delco and other parties, C.A. No. 98C-02-095-WTQ, seeking damages for negligence, strict liability, breach of contract, and breach of warranty relating to Delco's work on the faulty roof system.

On December 28, 1999, Plaintiffs settled with and released all parties in the civil action except Delco. Plaintiffs and Delco have stipulated to stay the state court action and to allow AE-Newark to have standing in place of Delco as plaintiffs in this declaratory judgment action.

Plaintiffs and Defendants agree that this Court must decide the legal issue of whether Delco is entitled to coverage under its commercial liability insurance policy with Defendants for damages to Plaintiffs' property.

II. STANDARD OF REVIEW

10 Del. C. § 6501 outlines the power of the courts regarding declaratory judgments:

> Except where the Constitution of this State provides otherwise, courts of record within their respective jurisdictions shall have power to declare rights, status and

> other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.

The principal purpose of a declaratory judgment is to promote preventive justice, in a situation where an injury has not yet occurred.1 This section does not create any substantive rights but merely provides a procedural means for securing judicial relief in an expeditious and comprehensive manner.2 The prerequisites of a controversy, such as will warrant consideration of a declaratory judgment action, may be summarized as follows: (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.3

10 Del. C. § 6510 provides that "[i]n any proceeding under this chapter the court may make such award of costs as may seem equitable and just."

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1 Stabler v. Ramsay, Del. Supr., 89 A.2d 544 (1952); Hampson v. State, Del. Supr., 233 A.2d 155 (1967).

2 Hoechst Celanese Corp. v. National Union Fire Ins. Co. , Del. Super.., 623 A.2d 1133 (1992).

3 Marshall v. Hill, Del. Super., 93 A.2d 524 (1952); City of Wilmington v. Delaware Coach Co., Del. Ch., 230 A.2d 762 (1967); Rollins Int'l, Inc. v. International Hydronics Corp., Del. Supr., 303 A.2d 660 (1973); Hoechst Celanese Corp. v. National Union Fire Ins. Co., Del. Super., 623 A.2d 1133 (1992); Mt. Hawley Ins. Co. v. Jenny Craig, Inc., Del. Super., 668 A.2d 763 (1995).

The interpretation of insurance contracts is purely a matter of law.4 Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning.5 Unless there is an ambiguity, the court will not destroy or twist policy language under the guise of construing it.6

An ambiguity exists when the contract language permits two or more reasonable interpretations.7 The Delaware Supreme Court has held that:

> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations and may have two or more different meanings.8

Where an ambiguity exists, the general rule is that the policy will be construed against the insurance company that issued it.9

III. DISCUSSION

The commercial liability insurance policy at issue provides in pertinent part:10

> 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' ....

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4 Hudson v. State Farm Mut. Auto. Ins. Co., Del. Supr., 569 A. 2d 1168, 1170 (1990).

5 Johnston v. Tally Ho, Inc., Del. Super., 303 A. 2d 677, 679 (1973).

6 State Farm Fire and Casualty Co. v. Hackendorn, Del. Super., 605 A.2d 3, 7 (1991).

7 Cheseroni v. Nationwide Mut. Ins. Co., Del. Super., 402 A.2d 1215, 1217 (1979).

8 Rhone-Poulenc v. American Motorist Ins., Del. Supr., 616 A.2d 1192, 1196 (1992).

9 Steigler v. Insurance Co. of North America, Del. Supr., 384 A.2d 398, 400 (1978).

10 See Pls. Opening Br., Exhibit A.

Exhibit A, p. 1.

> '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 ....

Exhibit A, p. 12.

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

Exhibit A, p. 11.

> This insurance does not apply to:
>
> 'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Exhibit A, p. 3.

> 'Products-completed operations hazard' includes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except:
> (1) Products that are still in your physical possession; or
> (2) Work that has not yet been completed or abandoned.

Exhibit A, p. 11.

Plaintiffs argue that there was 'property damage' under the policy caused by an 'occurrence' - the leaking roof's repeated exposure to the elements. Plaintiffs argue that the policy exclusion for "'Property damage' to 'your work' arising out of it or any part of it..." is not implicated here because of the explicit exception in the policy for work

performed on the insured's behalf by a subcontractor: "[t]his exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." Plaintiffs argue that the damage to Delco's work arose from Delco's subcontractor Manville, who failed to provide Delco with a protective water sealant for the roof, and failed to instruct Delco to apply such a protective coating. Plaintiffs argue that since Manville is a subcontractor to Delco, and that since the damaged roof work was performed by Manville on behalf of Delco, the policy exclusion for 'your work' – here, Delco's work – does not apply.

Defendants argue that there was no 'property damage' under the policy. Defendants argue that the policy exclusion for 'your work' is a "business risk exclusion" that is designed to protect insurer's from the insured's attempt to recover money for the insured's own shoddy workmanship. Defendants argue that this is a textbook case of a policy exclusion designed to exempt "damage to the work of the insured because of the work of the insured".11 Defendants argue that if the court were to declare the roof covered under the policy here, "then no contractor would ever complete his work in a good and workmanlike manner."12 Defendants argue that the Delaware Superior Court case of Vari v. United States Fidelity and Guaranty Company is "directly on point" and holds that "damage to any part of the house itself is damage to the work of the insured which is excluded from coverage by the modified exclusion contained in the

11 Defs' Ans. Br. at 5.
12 Id.

endorsement."13 Defendants argue that although the policy's explicit exclusion for the work of subcontractors at first appears relevant, it is not; and at the same time the language is not "simply surplusage", but is meant to cover a situation where a total loss – such as a building burnt to the ground – "results from the work of the insured (as subcontracted out)."14

The parties agree that the insurance policy is not ambiguous.

There was clearly 'property damage' under the insurance policy that was caused by an 'occurrence'. Plaintiffs are correct that in this case, the policy exclusion for 'property damage' to 'your work' is not triggered because of the unequivocal exception in the policy for work performed by a subcontractor (Manville) on the behalf of the insured (Delco). The exception is clear: the exclusion for 'your work' - Delco's work - does not apply if the damaged work - the unsealed, leaky roof - was performed on behalf of the insured, Delco, by a subcontractor, Manville.

Vari v. United States Fidelity and Guaranty Company is distinguishable from the present action.15 In that case, Vari was a contractor being sued by homeowners for negligent workmanship. Vari, the insured, sought a declaratory judgment that his insurer's policy covered the claims at issue. In the insurance policy in Vari, there was an exclusion for "property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of such material, parts or equipment

13 Id. at 8.
14 Id. at 9.
15 Del. Super., 523 A.2d 549 (1986).

furnished in connection therewith...".16 This exclusion was later replaced with different language in the policy that excluded coverage for "property damage to work performed by the named insured arising out of such work or any portion thereof, or out of such material, parts or equipment furnished in connection therewith."17 Vari argued that this replacement exclusion language did not apply to "damage to work performed resulting from deficient performance by subcontractors"; in other words, to work performed "on behalf of the Named Insured".18 However, in Vari, unlike the present case, there was no separate and explicit exception for work performed by subcontractors that falls outside the exclusion for the work performed by the insured general contractor.

Further, Defendants misquote and misconstrue the language used in the Vari case when Defendants argue that "Thus, a subcontractor's exclusion would be less encompassing in any damage to the larger work or item caused by his product or work would be damage to other property which would fall outside the policy."19 The actual language in Vari is quite different: "Thus, a subcontractor's exclusion would be less encompassing and any damage to the larger work or item caused by his product or work would be damage to other property which would fall outside [the exclusions] *and be covered*" (emphasis added).20

16 Vari at 551.
17 Id.
18 Id. at 552.
19 Defs' Ans. Br. at 9.
20 Id. at 552 (quoting Indiana Ins. Co. v. DeZutti, Ind. Supr., 408 N.E. 2d. 1275 (1980)).

Therefore, Vari dealt with an insurance policy that did not have an explicit exception for a subcontractor's work following an exclusion for the work of the insured general contractor. In this case, there is such an explicit exception for a subcontractor's work to the 'your work' exclusion for the general contractor's work product.

In this case, the Defendants' coverage policy is clear and unambiguous. It contains an exclusion for damages to Delco's work. It specifically states that the exclusion does not apply if the damages resulted from the performance of a subcontractor. There is no dispute that the damaged roof resulted from the failure of the subcontractor, Manville, to properly apply a weather sealant or to instruct Delco to apply such a sealant. Therefore, Defendants are liable for the roof damages under their policy with Delco.

Plaintiffs are entitled to costs under 10 Del. C. § 6510.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' Motion for a Declaratory Judgment is **GRANTED**.

IT IS SO ORDERED.

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John E. Babiarz, Jr.

JEB,jr/SR/BJW
Original to Prothonotary