

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TERRA NOVA GAS STATION, INC., a
California Corporation, GOLDEN
SUNRISE PROPERTIES LLC, a
California Limited Liability Company,

Plaintiffs,

v.

AMCO INSURANCE COMPANY, an
Iowa Corporation, ALLIED
INSURANCE COMPANY, an Iowa
Corporation, and DOES 1 to 100,
inclusive,

Defendants.

Case No.: 16cv1565-JLS (DHB)
**ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS**
(ECF No. 16)

Presently before the Court is Defendants Amco Insurance Company’s and Allied Insurance Company’s Motion for Judgment on the Pleadings (“MJP”). (ECF No. 16). Also before the Court are Plaintiffs’ Response in Opposition to (“Opp’n”), (ECF No. 18), and Defendants’ Reply in Support of (“Reply”), (ECF No. 19), Defendants’ Motion. The Court vacated the scheduled hearing and took the matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 20.) Having considered the Parties’ arguments and the law, the Court **GRANTS** Defendants’ Motion.

1 **BACKGROUND**

2 Plaintiffs are the owners and operators of a gas station and convenience store located
3 in Chula Vista, California. (Notice of Removal Ex. 1 (“Compl.”), ¶ 7, ECF No. 1-2.)
4 Defendants insured Plaintiffs’ property via a written contract and insurance policy, which
5 document Plaintiffs in turn attached to their Complaint. (*Id.*; *id.* Ex. A (the “Insurance
6 Policy”).)

7 The underlying dispute arises from Defendants’ denial of coverage for an August
8 2014 incident where Plaintiffs’ fuel tank was allegedly “damaged by the acts of Shell Oil
9 and . . . its agents and employees.” (*Id.* ¶ 8.) Specifically, Plaintiffs allege they “received a
10 delivery of fuel from [their] supplier” and the person who “delivered the fuel . . . punctured
11 the tank when he dropped the measurement stick in the tank to determine its fuel level.”
12 (Opp’n 2.) Defendants denied coverage for the incident, initially stating that the damage
13 was caused by “long term wear and tear from other deliveries[.]” (*id.*; Reply 3 n.2), and
14 later asserting that the Insurance Policy’s “Negligent Work” exclusion bars Plaintiffs’
15 recovery, (*see generally* MJP). Defendants now move for judgment on the pleadings based
16 on the latter theory. (*See generally* MJP.)¹

17 **LEGAL STANDARD**

18 Any party may move for judgment on the pleadings “[a]fter the pleadings are
19 closed—but early enough not to delay trial.” Fed. R. Civ. P. 12(c). A motion for judgment
20 on the pleadings attacks the legal sufficiency of the claims alleged in the complaint. *See*
21 *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (“Because the
22 motions are functionally identical, the same standard of review applicable to a Rule 12(b)
23 motion applies to its Rule 12(c) analog.”). The Court must construe “all material allegations
24 of the non-moving party as contained in the pleadings as true, and [construe] the pleadings
25 in the light most favorable to the [non-moving] party.” *Doyle v. Raley’s Inc.*, 158 F.3d
26

27
28 ¹ Plaintiffs bring causes of action for breach of contract and breach of the implied covenant of good faith
and fair dealing. (Compl. ¶¶ 12–35.)

1 1012, 1014 (9th Cir. 1998). “Judgment on the pleadings is proper when the moving party
2 clearly establishes on the face of the pleadings that no material issue of fact remains to be
3 resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v.*
4 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

5 ANALYSIS

6 The Parties do not dispute that the Insurance Policy and its Negligent Work
7 Exclusion are enforceable and control the outcome of Defendants’ Motion. Accordingly,
8 the only question is whether the Negligent Work exclusion bars coverage for the particular
9 cause of damage here at issue—the Shell delivery driver puncturing the fuel tank with her
10 measuring device. The Court begins its analysis by looking to the plain text of the
11 exclusion.

12 The relevant exclusion reads:

14 c. Negligent Work

Faulty, inadequate or defective:

- 15 (1) Planning, zoning, development, surveying, siting;
- 16 (2) Design, specifications, workmanship, work methods, repair,
17 construction, renovation, remodeling, grading, compaction, failure to
18 protect the property;
- 19 (3) Materials used in repair, construction, renovation or remodeling; or
- (4) Maintenance;
of part or all of any property on or off the described premises.

20
21 (Insurance Policy 26, ECF No. 1-2, at 61.) Defendants argue that either of section (c)(2)’s
22 exclusions for “workmanship” or “work methods” directly cover the damage here at issue.
23 (MTD 5–8.) Plaintiffs disagree, noting that “the policy does not define the term ‘work[,]’ ”
24 and arguing—without citation to authority—that “it is clear the policy is not referring to
25 work in the classic sense of one’s labor” but instead “refers to ‘work’ in the sense of the
26 result” of one’s “labor or things.” (Opp’n 7–8.) The Court agrees with Defendants.

27 As an initial matter, Plaintiffs include a paragraph discussing general California
28 contract-law principles regarding ambiguity. (*Id.* at 6.) And although Plaintiffs do not

1 actually argue that the language here at issue is ambiguous, (*see id.* at 7–9), the Court
2 nonetheless first addresses this issue of construction.

3 “The question of whether policy language is ambiguous is one of law.” *Johnson v.*
4 *Cont’l Ins. Cos.*, 202 Cal. App. 3d 477, 480 (1988). Ordinarily “[t]he ‘clear and explicit’
5 meaning of [contract] provisions, interpreted in their ‘ordinary and popular sense,’ unless
6 ‘used by the parties in a technical sense or a special meaning is given to them by usage’
7 . . . , controls judicial interpretation.” *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822
8 (1990) (citing Cal. Civ. Code §§ 1638, 1644). However, if there is “actual or apparent
9 ambiguity” in the contract language then as a general matter the language will be construed
10 in favor of the insured. *Johnson*, 202 Cal. App. 3d at 481. But “the predicate to interpreting
11 ambiguities in favor of coverage is that the policy be reasonably susceptible to more than
12 one interpretation. Where a policy clearly excludes coverage, [the court] will not indulge
13 in tortured constructions to divine some theoretical ambiguity in order to find coverage.”
14 *Titan Corp. v. Aetna Cas. & Sur. Co.*, 22 Cal. App. 4th 457, 469 (1994) (emphasis in
15 original) (citing *City of Laguna Beach v. Mead Reinsurance Corp.*, 226 Cal. App. 3d 822,
16 830–31 (1990)).

17 In the present case, it is true that the “Negligent Work” exception is syntactically
18 nonsensical when either of Defendants’ argued terms are utilized. For example, it makes
19 sense to provide an exclusion for “faulty . . . siting . . . of part or all of any property on or
20 off the described premises.” (Insurance Policy 26, ECF No. 1-2, at 61 (emphasis added).)
21 Or perhaps—while not grammatically perfect—for “inadequate . . . specifications . . . of
22 part or all of any property on or off the described premises.” (*Id.* (emphasis added).)
23 However, “faulty . . . workmanship . . . of part or all of any property on or off the described
24 premises” makes demonstrably less sense. (*Id.* (emphasis added).) The first possible
25 construction, an exclusion for “faulty . . . workmanship . . . [created on behalf] of part or
26 all of any property[,]” (*id.*), requires that there be, perhaps, automated machinery of some
27 sort that would otherwise be covered by protection but somehow negligently produces
28 work product. The second construction, an exclusion for “faulty . . . workmanship . . . [in

1 the creation or care] of part or all of any property[,]" (*id.*), is rendered completely redundant
2 by the language that immediately follows: exclusions for "faulty . . . repair, construction,
3 renovation, remodeling, grading, [or] compaction . . . of part or all of any property[,]" (*id.*
4 (emphases added).) Finally, implicating these same problems—but even more
5 nonsensical—is "defective . . . work methods . . . of part or all of any property on or off the
6 described premises."² (*Id.* (emphasis added).)

7 However, just because something is poorly drafted does not therefore necessarily
8 make it ambiguous. *See Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5
9 Cal. 4th 854, 867 (1993) ("[L]anguage in a contract must be construed in the context of
10 that instrument as a whole, and in the circumstances of that case, and cannot be found to
11 be ambiguous in the abstract." (alteration in original) (one instance of emphasis removed,
12 remaining emphasis in original) (quoting *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254,
13 1265 (1992))); *Titan Corp.*, 22 Cal. App. 4th at 469 (noting that ambiguity results only
14 when the language as a whole is "reasonably susceptible to more than one interpretation"
15 (emphasis in original)). And in the present case, taken in concert, the varying aspects of
16 the exclusion reveal a common theme: a purpose to exclude coverage regarding any
17 negligent work that is performed in readying for use or maintaining the covered buildings
18 or fixtures.³ Viewed in this light, it is clear that the policy directly addresses and excludes
19 the type of damage that here occurred. A third-party contractor was evaluating the fuel tank
20 in order to maintain its usefulness to the business; i.e., without checking the fuel level
21 Plaintiffs would not have known when to refill the tank except to wait for the pumps to
22 literally run dry, thus costing Plaintiffs valuable business. Unfortunately, the third-party

24 ² There is a third, most egregious, example: a purported exclusion for "faulty . . . failure to protect the
25 property . . . of part or all of any property on or off the described premises." (*Id.* (emphasis added).)

26 ³ Although Defendants do not argue it, perhaps the most on-point provision is the exclusion for "faulty
27 . . . [m]aintenance . . . of part . . . of any property on or off the described premises." (Insurance Policy 26
28 (emphasis added).) There are no syntactical problems in construction, and the whole purpose of the fuel
tank here at issue is to hold fuel for customers so that Plaintiffs' business can turn a profit. Accordingly,
checking fuel levels in order to keep the tank full and at profit-maximizing capacity is clearly
"maintenance" of the otherwise-covered tank.

1 contractor allegedly used a negligent work method in maintaining the fixture’s economic
2 viability to Plaintiffs’ business, which in turn harmed the fixture and Plaintiffs’ business.
3 However, this specific type of harm is excluded under Plaintiffs’ policy, and thus the plain
4 language of the exclusion establishes that Defendants have no liability in this suit.

5 Defendants’ cited case of *Waldsmith v. State Farm Fire and Casualty, Co.* further
6 confirms this conclusion. 232 Cal. App. 3d 693 (1991). In *Waldsmith*, the California Court
7 of Appeal determined that the relevant insurance policy excluded damage to the plaintiff’s
8 home when the damage was caused by a landslide allegedly stemming from the city’s
9 negligent maintenance of a nearby water main. *Id.* at 695–99. Notably, the relevant
10 exclusion specified that:

11
12 We do not insure for loss consisting of one or more of the items below
13 [¶] a. conduct, act, failure to act, or decision of any person, group, organization
14 or government body whether intentional, wrongful, negligent, or without
15 fault; [¶] b. defect, weakness, inadequacy, fault or unsoundness in: [¶] (1)
16 planning, zoning development, surveying, siting; [¶] (2) design,
17 specifications, workmanship, construction grading, compaction; [¶] (3)
18 materials used in construction or repair or; [¶] (4) maintenance [¶] of any
19 property including land structures or improvements of any kind whether on
20 or off the residence premises.

19 *Waldsmith*, 232 Cal. App. 3d at 695–96 (footnote omitted) (emphases added). The
20 *Waldsmith* Court ultimately held that “negligent maintenance of the water main appears to
21 fall squarely under the exclusions” 232 Cal. App. 3d at 696.

22 Plaintiffs both attempt to distinguish *Waldsmith* and cite four out-of-circuit cases
23 (three applying New York law and one applying Oklahoma law) in support of their
24 construction of the relevant exclusion. (Opp’n 7–9.) The Court neither agrees with
25 Plaintiff’s argued distinctions nor finds the out-of-circuit authority persuasive. Although
26 Plaintiff contends that *Waldsmith* concerned only government negligence in constructing
27 and maintaining a water main, these distinctions do not negate the crucial factual
28 similarities to this case: a third-party actor negligently performing a required action that

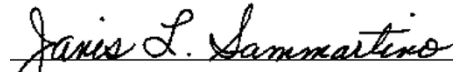
1 ultimately harms the plaintiff. And to the extent Plaintiffs correctly interpret their cited
2 precedent from (1) several New York-based, intermediate appellate courts; (2) the
3 Southern District of New York; and (3) the Tenth Circuit, none of these cases refute the
4 clear language of the California contract here at issue and the similarity between *Waldsmith*
5 and this case.

6 **CONCLUSION**

7 Given the foregoing, the Court **GRANTS** Defendants’ Motion for Judgment on the
8 Pleadings. Because the insurance contract specifically excludes coverage for the
9 underlying cause of Plaintiffs’ claims, no amendment will be able to cure Plaintiff’s
10 pleading defect. *See Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001) (“In
11 order to establish a breach of the implied covenant of good faith and fair dealing under
12 California law, a plaintiff must [first] show . . . benefits due under the policy were withheld
13 . . .”). Accordingly, this Order concludes the litigation in this matter. The Clerk **SHALL**
14 close the file.

15 **IT IS SO ORDERED.**

16 Dated: June 26, 2017

17 
18 Hon. Janis L. Sammartino
19 United States District Judge
20
21
22
23
24
25
26
27
28