

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

STODDARD EQUIPMENT CO, INC. *
 *
 * Civil No. JFM-13-3271
 *
 *
v. *
 *
AMERICAN SAFETY INDEMNITY CO., *
ET AL. *

OPINION

Stoddard Equipment Company, Inc. (“Stoddard”) has instituted this action against American Safety Indemnity Company (“American Safety”), Berkley Regional Specialty Insurance Company (“Berkley Specialty”), and Lead Hill Recreational and Real Estate, L.L.C. (“Lead Hill”), seeking a declaratory judgment that American Safety and Berkley Specialty have a duty to defend it in an action filed by Lead Hill against Stoddard in Missouri state court. Berkley Specialty has filed an answer and counterclaim. Lead Hill has filed an answer, stating that its position is identical to that of Stoddard. American Safety has filed a motion to dismiss. The motion will be granted.

I.

In its suit against Stoddard, Lead Hill alleges that Stoddard was negligent in installing a gasoline pipe leading from a gasoline holding tank to a marina on Lead Hill’s property where gasoline was sold. Specifically, Lead Hill claims that Stoddard (which had an installation contract with Lead Hill) was negligent in not burying the gas pipe deeply enough and using improperly large backfill material. Stoddard completed work on the installation of the gasoline pipe by early October, 2009.

According to the allegations contained in a second amended complaint filed by Lead Hill against Stoddard, on September 2, 2011, the gasoline holding tank was full but on the following morning, September 3, 2011, after Lead Hill unsuccessfully attempted to dispense gasoline at the marina, Lead Hill discovered that the gasoline holding tank was empty and that the soil around the pipe was saturated with gasoline. Approximately 500 gallons of gasoline spilled into the soil and the waters of an adjacent lake. According to Lead Hill, the spillage was due to Stoddard's negligence in installing the gasoline pipe.

American Safety issued a commercial insurance policy to Stoddard, with an effective date from November 3, 2008 through November 3, 2009. The policy provided coverage only for property damage that "occur[ed] during the policy period."

II.

American Safety argues that it owes no duty to defend Stoddard in the underlying litigation because any damage caused by the spillage clearly happened outside the policy period. I find this argument persuasive. According to the allegations in the second amended complaint filed by Lead Hill against Stoddard, it is undisputed that any damage to the property surrounding the gasoline pipe did not happen until after the policy issued by American Safety to Stoddard had expired.

Stoddard's reliance upon *D.R. Sherry Const., Ltd. v. American Fam. Mut. Ins. Co.*, 316 S.W. 3d 899 (Mo. 2010), is misplaced. There, an insurer was held to be obligated to provide coverage to a contractor that had built a house in which structural damage occurred because the soil on which the house was constructed was incapable of providing adequate support, causing it to be out of level by eight inches when it was inspected. At least implicit in the court's holding was the fact that the structural damage began to occur at the outset of construction during the

policy period. Therefore, in *D.R. Sherry*, the doctrine of “progressive injury” applied. In contrast, in the instant case there is no allegation or evidence of any leakage or spillage from the gasoline pipe until early September, 2011.¹ Indeed, there is no allegation that any hole in the gasoline pipe (which presumably coincided in time with leakage or spillage from the pipe) developed before November 3, 2009 – the expiration date of the American Safety policy.² Moreover, given the fact that only a month elapsed between the completion of the installation of the pipe (early October, 2009) and the expiration of the policy (November 3, 2009) and given the nature of the allegedly negligent installation (too shallow a tunnel and the use of improper backfill), it cannot be reasonably inferred that any hole developed in the pipe during the life of the policy. In that regard, it is also noteworthy that according to an allegation in the second amended complaint filed by Lead Hill against Stoddard, it was not until August, 2011, shortly before the major spillage happened, that Lead Hill first discovered that the gasoline pump at its boat dock was not receiving fuel from the gasoline storage tank.

¹ In *D.R. Sherry* the pertinent language of the insurance policy was virtually identical to the language of the policy in this case. The court focused upon whether an “occurrence,” rather than “property damage” had happened during the life of the policy. What is important, however, is that the court’s holding turned on evidence of “progressive injury,” which cannot be alleged here.

² The second amended complaint filed by Lead Hill against American Safety is careful not to allege the specific date on which any spillage occurred. According to the second amended complaint, “the spillage of gasoline was due to physical damage to the gasoline pipe which occurred at some unknown time prior to the afternoon of September 11 [2011].” Technically, this allegation is immaterial because the occurrence of some physical damage to the pipe, short of the development of a hole that one can reasonably infer immediately caused spillage or leakage, clearly was not covered by the policy. An exclusion in the policy provided that “[t]his insurance does not apply to . . . ‘property damage’ to ‘your product’ arising out of it or any part of it [and] ‘property damage’ to ‘your work’ arising out if it or any part of it” Nevertheless, the allegation is important because it highlights the inability of Lead Hill (and derivatively Stoddard) to identify the date on which spillage or leakage first happened.

