

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

FOUNTAINCOURT HOMEOWNERS'  
ASSOCIATION and FOUNTAINCOURT  
CONDOMINIUM OWNERS'  
ASSOCIATION,

Civil No. 09-655-AA  
OPINION AND ORDER

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

Defendant.

---

Anthony Rafel  
Rafel Law Group PLLC  
1100 SW 6<sup>th</sup> Ave., Ste. 1600  
Portland, Oregon 97204

Robert O'Halloran  
McEwen Gisvold LLP  
1600 Standard Plaza  
1100 SW 6<sup>th</sup> Avenue  
Portland, Oregon 97204  
Attorneys for plaintiffs

Todd S. Baran  
Todd S. Baran, PC  
4004 SE Division Street  
Portland, Oregon 97202-1645  
Attorney for defendant

AIKEN, Judge:

Plaintiffs filed a motion for partial summary judgment regarding the multi-unit exclusion. That motion is denied.

BACKGROUND

Plaintiffs filed a breach of contract action against defendant insurance company alleging bad faith relating to construction defects at the FountainCourt condominium and townhomes in Beaverton, Oregon. The buildings at issue at FountainCourt contain both condominium units and townhome units. Plaintiffs are the two owners' associations representing the condominium and townhome owners.

Defendant issued to Sideco, Inc., the siding subcontractor during construction of FountainCourt, two commercial general liability insurance policies, effective from May 1, 2004 to May 1, 2005, and May 1, 2005 to May 1, 2006 ("Insurance Policies"). The general contractor, Legend Homes Corporation ("Legend Homes") is an additional named insured on each of the two Insurance Policies. Each of the two Insurance Policies separately promised coverage of up to \$1,000,000 per occurrence, \$2,000,000 general aggregate, in the event that Sideco or Legend Homes became legally obligated to pay for damages due to bodily injury or property damage.

Plaintiffs sent notices of defect to the project developers including Legend Homes, and ultimately filed a lawsuit. The

developers and contractor then filed a Third-Party Complaint naming various subcontractors from the project. The Third-Party Complaint was ultimately amended to include Sideco, Inc.

Legend Homes then tendered defense and indemnity of the claims against it regarding FountainCourt to defendant. Defendant denied the tender relying in large part on an exclusion in the Insurance Policies entitled "Exclusion - Multi-Unit New Residential Construction (Greater than Eight Units)" (the "Multi-Unit Exclusion").

There are 11 structures at issue in FountainCourt, each containing multiple residential dwelling units with garages and individual entrances. The 11 structures are designated alphabetically A through K.

Structure A contains 4 townhouse units and 2 condominium units.

Structure B contains 5 townhouse units and 2 condominium units on one side, attached to 2 condominium units and 5 townhouse units on the other side. The two sets of 5 townhouse units do not connect, but all 4 condominium units connect.

Structure C contains 4 townhouse units and 2 condominium units on one side, attached to 2 condominium units and 4 townhouse units on the other side. The two sets of 4 townhouse units do not connect, but all 4 condominium units connect.

Structure D contains 3 townhouse units and 2 condominium units.

Structure E is comprised of two separate buildings that do not touch, one containing 4 townhouse units and one containing 8 townhouse units.

Structure F contains 3 townhouse units and 2 condominium units on one side, attached to 2 condominium units and 3 townhouse units on the other side. The two sets of 3 townhouse units do not connect, but all 4 condominium units connect.

Structure G contains 4 townhouse units and 2 condominium units on one side, attached to 2 condominium units and 3 townhouse units on the other side. The two sets of townhouse units do not connect, but all 4 condominium units connect.

Structure H contains 3 townhouse units and 2 condominium units on one side, attached to 2 condominium units and 3 townhouse units on the other side. The two sets of 3 townhouse units do not connect, but all 4 condominium units connect.

Structure J contains 3 townhouse units and 2 condominium units on one side, attached to 2 condominium units and 4 townhouse units on the other side. The two sets of townhouse units do not connect, but all 4 condominium units connect.

Structure K contains 4 townhouse units and 2 condominium units.

#### STANDARDS

Summary judgment is appropriate "if 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 the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56<sup>©</sup>. Substantive law on an issue determines the materiality of a fact. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987). Whether the evidence is such that a reasonable jury could return a

verdict for the nonmoving party determines the authenticity of a dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply when evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Electrical, 809 F.2d at 630.

#### DISCUSSION

The Multi-Unit Exclusion provides in relevant part:

This insurance does not apply to "bodily injury" or "property damage" arising out of:

1. "Your work" in connection with pre-construction, construction, post-construction of any "multi-unit residential building[.]"
2. Any of "your products" which will or have become a part of the real property of any 'multi-unit residential building.'

This exclusion does not apply to "your work" in connection with remodeling, maintenance or repair.

## Section V. Definitions

"Multi-Unit Residential Building" means a condominium, townhouse, apartment or similar structure, each of which has greater than eight units built or used for the purpose of residential occupancy.

Plaintiffs argue that the Multi-Unit Exclusion excludes coverage for only 10 townhouse units in Structure B. Every other FountainCourt building has 8 or fewer townhouse units and 8 or fewer condominium units. Defendant contends that the Multi-Use Exclusion excludes coverage for all units in Buildings B,C,F,G,H and J arguing that the Multi-Unit Exclusion precludes coverage for any building at FountainCourt that has greater than 8 total units, regardless of the type of such units (townhouse or condominium).

At issue in this lawsuit is whether the Multi-Unit Exclusion applies to Buildings C,F,G,H and J. There is no dispute that the exclusion does not apply to Buildings A, D, E, or K. Buildings A, D and K contain fewer than 8 units (townhouses or condominiums) and Building E is comprised of two separate buildings that do not touch, one building containing 4 townhouse units and the other building containing 8 townhouse units. The parties also agree that the exclusion does apply to Building B containing 10 townhouse units, but disagree as to its application to the 4 condominium units in that building.

In essence, the court must decide whether and to what extent Sideco's work on the FountainCourt project is excluded from

coverage by the Multi-Unit Exclusion. Under Oregon law, the interpretation of the meaning of an insurance policy is a question of law for the court. Hoffman Construction Co. v. Fred S. James & Co., 313 Or. 464, 469, 836 P.2d 703 (1992). Following Hoffman's directives: unambiguous language is enforced as written, and if language is ambiguous, "in the light of, among other things, the particular context in which that term is used in the policy and the broader context of the policy as a whole," then as a "last step," the court is to apply the maxim that ambiguities are to be resolved in favor of coverage." Farmers Ins. Co. v. Munson, 145 Or. App. 512, 521, 930 P.2d 878 (1996) (quoting Hoffman, 313 Or. at 469). The governing rule in the construction of an insurance policy is to ascertain the intent of the parties "based on the terms and conditions of the insurance policy." Hoffman, 313 Or. at 469. That analysis begins with the wording of the policy, applying any definitions contained in the policy, and otherwise presuming that words have their plain, ordinary meanings. Id. at 469-70.

Plaintiffs assert first that the Multi-Use Exclusion does not apply to the FountainCourt buildings because "it does not narrowly extend to mixed use buildings at all and the provision must be interpreted narrowly and construed against the insurer." Pl's Memo in Support, p. 9, fn 4. Plaintiff argues that the phrase "similar structure" does not include mixed-use buildings

such as the buildings at issue here, which contain both condominium and townhouse units. I disagree and find the phrase "similar structure" refers to other structures similar to apartments, condominiums and townhouses.

Plaintiff next argues that even if the Exclusion applies, it excludes coverage only for the ten townhouse units in Building B. Plaintiff contends that the provision is ambiguous because it is just as reasonable to exclude mixed-use buildings, which contain both townhomes and condominium units, as to include them in the definition.

I disagree and find that the Exclusion precludes coverage for any building at FountainCourt that has greater than 8 total units, regardless of which type of unit (townhouse or condominium). Critical to this finding is the Exclusion's requirement that the structure must be "built or used for the purpose of residential occupancy," meaning that a deciding factor in whether a building falls within the definition is its intended or actual use. Therefore, a building falls within this definition only if it is constructed for the purpose of residential occupancy, or is actually so used. A building falls within the definition no matter whether the residential units within the structure are owned by one entity or several. Plaintiff's argument that the townhouses and condominiums are owned by two separate and distinct legal associations is



irrelevant when deciding whether a building falls within the definition of "Multi-Use Residential Building." There is no dispute that the individual units in the buildings were all built to be used, and are being used, as residences. The fact that the units are "mixed ownership" (some townhouses, some condominiums) does not affect the application of the Multi-Unit Exclusion and the fact that the units were built for and are being used as Residential units.

Plaintiff's argument that the application of the Exclusion depends on whether the owner(s) of at least nine residential units in a building have the same rights, or incidents of ownership, is flawed. If that were the correct interpretation, it would be possible for owner(s) of units within a multi-unit structure to avoid the application of the Multi-Use Exclusion in a builder's insurance policy simply by changing the incidents of ownership. Specifically, a nine-unit building that started as a condominium, thus triggering the Multi-Unit Exclusion, could be divided into condominiums and townhomes, or into condominiums and apartments to reduce the total number of residential units that share common incidents of ownership in order to fall below the nine unit threshold of the Multi-Unit Exclusion. I find that the exclusion unambiguously applies to units that are "built or used for [residences]." Under this language, a structure that contains more than eight residential units when "built" will

trigger the exclusion, even if some of those units are later converted to other uses. If the court examines the purpose of the Exclusion, it is reasonable to assume that the Exclusion was designed to avoid certain risks that are irrelevant to the incidents of unit ownership. Rather, those risks are created by the use of those units; specifically, residential use of multiple units within a single structure presents the same risks regardless of the ownership rights of the unit owners. In support, the Exclusion lists the multi-unit buildings: condominium, townhouse, apartment and then adds "or similar structure." The term "structure" does not refer to legal ownership of the buildings or units, instead it refers to the physical composition of the building. The Exclusion applies to any building that is similar in structure to a "condominium," "townhouse," or "apartment," no matter how the units in the structure are legally owned. The critical structural features of condominiums, townhouses and apartments are the contiguous walls, floors and roofs. Because each of the individual buildings with the FountainCourt development share those same structural features, damage to any one of those structures that contain more than eight residential units triggers the Multi-Use Exclusion. Further, I find that the phrase "each of which [has greater than eight units built]" in the Exclusion refers to a structure and not to units within a structure. Again, the Multi-Unit Exclusion

focuses on the type of use ("purpose of residential occupancy") rather than the incidents of ownership.

Therefore, I find that the Exclusion applies if a structure similar to a condominium, townhouse or apartment was "built" to include more than eight residential units, regardless of how the individual units are owned.

CONCLUSION

Plaintiffs' motion for partial summary judgment (doc. 9) is denied.

IT IS SO ORDERED.

Dated this 10 day of November 2009.



---

Ann Aiken  
United States District Judge