STATE OF RHODE ISLAND

KENT, SC. **SUPERIOR COURT**

(FILED: January 19, 2021)

DUTCHMAN DENTAL LLC; **DMV HOLDING COMPANY LLC;** **AND JOHN P. VAN REGENMORTER**	:	
v.	:	**C.A. No. KC-2016-1281**
THE PROVIDENCE MUTUAL FIRE INSURANCE COMPANY	:	

DECISION

LANPHEAR, J. This matter came on for hearing before the Court on November 9, 2020 on Defendant Providence Mutual Fire Insurance Company's Motion for Partial Summary Judgment.

I

Facts and Travel

Plaintiff, Dutchman Dental, LLC (Dutchman), is a business operating in Rhode Island in a property owned by DMV Holding Company LLC (DMV). Am. Compl. ¶ 1. John P. Van Regenmorter is the managing member of both companies. *Id.* Defendant, Providence Mutual Fire Insurance Company (Insurer), is a Rhode Island business located in Warwick, Rhode Island. *Id.* ¶ 2. Dutchman entered into a contract of insurance with Insurer, Insurance Policy No. BOP0092782 00 with coverage effective from January 16, 2016 through January 16, 2017. *Id.* ¶ 3. DMV is named as an insured on the policy. *Id.* ¶ 35. The policy required the Insurer to pay for direct physical loss of or damage to the property at 1359 Main Road in Tiverton, Rhode Island (Covered Property). *Id.* ¶ 4. The policy specifically states, "[w]e will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations [clause] by or

resulting from any Covered Cause of Loss." Answer ¶ 2. In April 2011, Dutchman purchased the Covered Property from DMV. Def.'s Mem. Supp. Mot. Summ. J. (Def.'s Mem.) 3.

On October 28, 2016, hundreds of gallons of heating oil were poured into the basement of the Covered Property through a disconnected fill pipe by Mike's Oil. Am. Compl. ¶ 5. Dutchman filed claims for loss of business income and continuing business operating expenses. On January 27, 2017, Insurer denied coverage to DMV and Mr. Van Regenmorter under the liability section of the policy. *Id.* ¶ 8. Dutchman then commenced this action and a separate action against Mike's Oil (C.A. No. KC-2017-0007). Mike's Oil filed a third-party claim against DMV. Upon receipt of the third-party claim, DMV requested a defense from Insurer pursuant to the liability coverage provided in the policy. The Insurer removed DMV as a named insured from the policy and denied a duty to defend.

In this action, Dutchman alleges Insurer breached its policy by failing to defend and indemnify DMV and Mr. Van Regenmorter when they were named as third-party defendants by Mike's Oil.[1]

Insurer now moves for partial summary judgment on the third-party (liability) coverage in the policy, particularly for "[r]efusing to defend plaintiffs that were named as third-party defendants in the claim filed by Mike's Oil in Kent County Superior Court, Civil Action No. KC-2017-0007." Def.'s Mem. 5. In response, Plaintiffs filed a memorandum in objection. The memorandum also requests judgment against Insurer for breach of contract and bad faith.

[1] Dutchman previously moved for summary judgment on Insurer's breach of Section I of the policy, which provided first-party coverage to Dutchman for the loss. In a Decision of March 11, 2020, this Court granted summary judgment to Dutchman on Section I of the policy.

II

Analysis

Insurer raises three separate contentions to justify its failure to defend:

- DMV and Mr. Van Regenmorter have no insurable interest;
- Coverage for pollution is excluded from the liability coverage of the policy;
- Coverage is limited where a party owns, rents, or occupies the property.

A

Insurable Interest

Insurer notes that DMV conveyed the Covered Property in April 2011. Therefore, Insurer contends that neither DMV nor Mr. Van Regenmorter had an insurable interest for the October 2016 loss, so there was no duty to defend or indemnify either of them. Using the same analysis, Insurer claims it was justified in unilaterally removing each of them as insureds under the policy shortly after the loss.

In order to be protected by an insurance policy, it is normal practice that the insured party have some interest in the item which is being protected by the insurance, or an insurable interest. *Sherwood Brands, Inc. v. Pennsylvania Manufacturers' Association Insurance Co.*, No. 08-051ML, 2010 WL 5477749, at *3 (D.R.I. Dec. 7, 2010), report and recommendation adopted *sub nom. Sherwood Brands, Inc. v. Pennsylvania Manufacturer's Association Insurance Co*., No. CA 08-051 ML, 2010 WL 5477767 (D.R.I. Dec. 30, 2010). "The insurable interest requirement may at first glance appear unfair to policyholders, because presumably a policyholder would not pay premiums to insure a property that has no economic value to him. But the insurable interest requirement serves three policies that would not be served by merely deferring to the policyholder's decision to pay for insurance." *New Ponce Shopping Center, S.E. v. Integrand*

Assurance Company, 86 F.3d 265, 268 (1st Cir. 1996). An insurable interest is intended (1) to "prevent[] gambling through insurance policies[; (2) to] prevent[] rewarding and thereby tempting the destruction of property[;] and [(3) to] confine[] insurance contracts to indemnity." *Id.*

Here, however, DMV and Mr. Van Regenmorter acknowledge that they no longer hold a personal interest in the real estate which was harmed. Still, they are third-party defendants in the action against Mike's Oil because they are being blamed for the liability—for allegedly contributing to the cause of the oil spill. As another court has reasoned:

> "It is true that to support an action on a policy which insures a property right, i.e., against collision, fire, wind or theft, etc., an insurable interest in the named insured must be proved. On the other hand, where an insurance policy is one of indemnity against liability for loss and injury sustained by others and caused by the use of an automobile or other property named in the policy, an insurable interest in the named insured is not a prerequisite to a recovery against the insurer.
>
> "There is a marked difference between a contract of insurance against loss and one against liability. 44 C.J.S. Insurance § 24, p. 482; *Slavens v. Standard Acc. Ins. Co.*, 9 Cir., 27 F.2d 859, 861; *Michel v. American Fire & Casualty Co.*, 5 Cir., 82 F.2d 583, 586, and *Ohio Casualty Ins. Co. v. Beckwith*, 5 Cir., 74 F.2d 75, at page 77, where the court, said that the distinction between these two types of insurance is of long standing and is well-recognized." *Ohio Farmer's Insurance Co. v. Lantz*, 246 F.2d 182, 185 (7th Cir. 1957).

Insurer references *Rhode Island Joint Reinsurance Association v. O'Sullivan*, 91 A.3d 824, 829 (R.I. 2014) to justify the purported requirement of an ownership interest in the property being harmed. While *O'Sullivan* referenced that general principle, it involved only a first-party claim (the owner seeking recovery from their insurer) for a water loss—not a third-party claim for potential liability to others. *O'Sullivan* was an interpleader action asking for a determination of who was entitled to excess insurance proceeds after a mortgage foreclosure on the property. The water damage occurred in 2010, the assignee of a mortgagee (the Gurnicks) foreclosed in 2011,

and the proceeds were available in 2012. The Court denied recovery to the foreclosing mortgagee as it was not listed on the insurance. A junior mortgagee, expressly listed as an insured on the policy, recovered the excess insurance proceeds—even though it had no interest in the property after the foreclosure (and hence had no remaining insurable interest). Our high court emphasized that the Gurnicks were not even parties to the insurance contract.

Other states have followed a different course, holding that for purposes of liability insurance, the insurable interest depends solely upon whether the insured may be charged with the liability against which the insurance is procured. *Stephens v. Conyers Apostolic Church*, 532 S.E.2d 728 (Ga. 2000); *Rea v. Hardware Mutual Casualty Co.*, 190 S.E.2d 708 (N.C. 1972). Thus, they reason, an individual has an unlimited insurable interest in his or her own liability. *Western Casualty & Surety Co. v. Herman*, 318 F.2d 50, 54 (8th Cir. 1963).

Both DMV and Mr. Van Regenmorter have an interest in limiting their own liability and have been charged with liability for their former interest in the building. The pending claims against each of them are based on just that: their prior interests in the building.

Accordingly, Insurer's claim that it need not indemnify or defend DMV or Mr. Van Regenmorter because of a lack of an insurable interest fails.[2] Summary judgment will not be afforded on this ground.

Before leaving this issue, the Court cannot simply pass over the Insurer's unilateral removal of DMV and Mr. Van Regenmorter from coverage shortly after the date of loss. To do so on the alleged contention that they lacked an insurable interest was highly questionable, and an

[2] Insurer obviously recognizes the distinction between liability coverage and first-party loss protection. In its reply memorandum of November 2, 2020 at page 7, while addressing another argument, Insurer declared, "[t]he Policy bars liability coverage for property damage . . . that you own, rent or occupy. Here there is no dispute that DMV Holding and Mr. Van Regenmorter owned and/or occupied the property. . . ."

established insurer should have known better. The Court may have an opportunity to discuss this at another time.

B

Pollution Exclusion

The policy (Def.'s Ex. 1) is organized like many insurance policies. It first sets forth a declarations page and then general exclusions of coverage. Section I of the policy then sets the coverage for losses to the insureds' property, while Section II sets the indemnification and duty to defend for the insureds' liability. In the liability portion of the policy is an exclusion for pollution, which states in part:

> **"SECTION II – LIABILITY**
> **"B. Exclusions**
> **"1. Applicable to Business Liability Coverage**
> **"This insurance does not apply to:**
> **" . . .**
> **"f. Pollution**
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
> "(a) At or from any premises, site or location . . . ." Def.'s Ex.1 at 54-57 (emphasis added).

Here, the Plaintiffs are seeking protection under the liability coverage section for harm which they may suffer in the separate suit with Mike's Oil. Mike's Oil brought them in as third-party defendants when Mike's Oil was named by Dutchman in a suit. Mike's Oil, DMV, and Mr. Van Regenmorter have all been named as defendants for their alleged liability for discharge, dispersal, seepage, migration, release, or escape of the home heating oil placed into the basement of the Covered Property. Def.'s Opp'n Mem. 13.

Neither party seriously disputes that home heating oil is a pollutant,[3] particularly when it is released from any container. Def.'s Reply Mem. 2. Additionally, the Plaintiffs do not dispute that the third-party claim alleges property damages arising out of the discharge or release of a pollutant. *Id.* Hence, the express language of the policy excludes protection under the liability section for this loss.

The Plaintiffs' defense to this claimed exclusion is that the Court already denied application of the pollution exclusion for the property damage, and that the pollution exclusion clause contains no anti-concurrent causation language. That argument was successful in this Court's earlier Decision finding coverage under Section I for first-party property damage. *Dutchman Dental LLC v. The Providence Mutual Fire Insurance Company*, No. KC-2016-1281, 2020 WL 1275581, at *5 (R.I. Super. Mar. 11, 2020). There, this Court relied on *Jussim v. Massachusetts Bay Insurance Co.*, 610 N.E.2d 954 (Mass. 1993). Neighbors upgrade from the Jussims suffered a 500-gallon fuel oil release and the oil flowed down to the Jussims' property. Referencing cases where the harm occurred off the insured's premises, and hence the efficient proximate cause was an insured risk under an 'all risk' homeowner's policy, the Massachusetts Supreme Judicial Court allowed coverage. The same cannot be alleged here for an uncapped oil line on the Dutchman's property. The Jussims sought coverage for damage they suffered themselves. Unfortunately, the Plaintiffs here fail to reference the covered risk of loss which may provide coverage for the resultant environmental damage. This was not a claim for liability coverage as the Jussims were not alleged to be at fault for what happened to them.

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[3] This Court concluded that oil is a pollutant under the policy in its March 11, 2020 Decision.

The lack of any anti-concurrent causation language may have been fatal to requiring the Insurer to afford coverage for property damage. However, it is of no help here where the exclusion is contained in the body of the Section II liability coverage, at issue in this motion.[4]

In sum, Plaintiffs claim that the environmental exclusion contained in the third-party liability coverage of the policy does not apply because of the lack of anti-concurrent causation language in the policy. Here, the cause is alleged to be Plaintiffs' comparative negligence, and coverage for this is expressly excluded because the environmental exclusion is included in the liability provision itself.

Accordingly, Insurer's motion for summary judgment on the issue of liability coverage is granted, based on the pollution exclusion.

C

Owned Property Exclusion

Insurer claims that it is entitled to summary judgment against Plaintiffs as the policy excludes certain coverage for "Property damage" for property which "you own, rent or occupy." Def.'s Ex. 1 at 60. It seems reasonable and appropriate for an insurer in a commercial context to limit liability coverage for what an insured has done on its own property. However, this Court refrains from addressing this issue as summary judgment will be granted to Insurer based on the pollution exclusion exception.

[4] On page 6 of its September 14, 2020 memo, Plaintiffs even suggest that Insurer's actions are "vexatious" and justify the imposition of sanctions. Here Plaintiffs' counsel, well-versed in the implications of the lack of an anti-concurrent causation clause, the environmental exclusion, and the Jussim case, knows better.

D

Plaintiffs' Cross Motion Regarding Bad Faith

After the Insurer's motion for partial summary judgment had been pending for two months and shortly before the second scheduled hearing date, the Plaintiffs countered with a memorandum in opposition. Included within the memorandum were requests for grants of summary judgment against Insurer. No separate motion was ever filed or scheduled, contrary to the Court's protocols. Kent County Superior Court protocol of November 19, 2019. This placed the Insurer in a precarious situation, unsure of its need to address the phantom motion while in the process of responding to hundreds of requests for admissions, replacing counsel of record, and addressing other discovery and motions. Accordingly, the Court will not rule on these issues at this time. If the Plaintiffs desire to press a motion for summary judgment, a motion should be filed and scheduled pursuant to the protocol.

III

Conclusion

Insurer's Motion for Partial Summary Judgment on the issue of liability coverage against Plaintiffs DMV and Mr. Van Regenmorter are granted. Plaintiffs' requests for summary judgment (as referenced herein) are denied without prejudice.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Dutchman Dental LLC, et al. v. The Providence Mutual Fire Insurance Company**
CASE NO:	**KC-2016-1281**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**January 19, 2021**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**Kevin J. Holley, Esq.**
For Defendant:	**Patricia A. Buckley, Esq.; Brendan Lowd, Esq.; Todd J. Romano, Esq.; Laura E. Stephens, Esq.**