

2012 IL App (2d) 110819-U
No. 2-11-0819
Order filed June 25, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PARADISE INGROUND POOLS, INC.,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff and Citation)	
Petitioner-Appellant,)	
)	
v.)	No. 09-L-24
)	
BLACK DIAMOND PLUMBING AND)	
MECHANICAL, INC.,)	
)	
Defendant)	
)	Honorable
(Harleysville Lake States Insurance Company,)	Kevin T. Busch,
Citation Respondent-Appellee).)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

Held: The trial court properly granted the insurer summary judgment on plaintiff's citation to discover assets for coverage of a settlement between plaintiff and the subcontractor-insured, as damage from the insured's defective workmanship was not "an accident" and thus was excluded from the policy, and the fact that the damage reached other parts of the same building, beyond those on which the insured worked, was insufficient to make the damage covered as damage to "other property."

¶ 1 Plaintiff, Paradise Inground Pools, Inc., appeals the trial court's order finding that Harleysville Great Lakes Insurance Company (Harleysville) had no duty to defend its insured, defendant Black Diamond Plumbing and Mechanical, Inc. (Black Diamond), on plaintiff's underlying complaint alleging that Black Diamond's defective workmanship damaged property owned by Keith Tarson. The court held that the complaint alleged nothing more than the natural consequences of defective workmanship, which was not an "occurrence" as defined by Harleysville's policy. Plaintiff contends that the trial court erred by finding that the damage was not an "occurrence" within the meaning of the policy. We affirm.

¶ 2 In 2006, plaintiff contracted to remodel Keith Tarson's home. The project included the construction of a "three-season" room. Plaintiff hired Black Diamond to do electrical and plumbing work on the project, paying Black Diamond \$23,340 for its work. However, according to plaintiff, there were numerous defects in the work, which it had to repair at a cost of \$84,259.50. On January 15, 2009, plaintiff sued Black Diamond to recover these damages.

¶ 3 The complaint alleged that, among other things, Black Diamond installed an underground hot-water line that lost heat, requiring Tarson's property to be dug up to correct the problem. Also, Black Diamond installed a drain system in which it switched the drain with the clean-out. This required the entire room to be broken up to put in proper drainage and resulted in Tarson being unable to use the room until the property was corrected. In addition, Black Diamond installed a water supply system, tested it by filling it with water, but did not completely drain the system. As a result, water froze during the winter, causing the pipes to fracture, which in turn led to water leaking into and damaging the walls.

¶ 4 Black Diamond had a general comprehensive liability (GCL) policy with Harleysville that provided coverage for “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury,’ ‘property damage,’ ‘personal injury’ or ‘advertising injury’ *** that is caused by an ‘occurrence.’” The policy excluded coverage for property damage to “[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the ‘property damage’ arises out of those operations.” The policy defined “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general conditions.”

¶ 5 Black Diamond tendered defense of the complaint to Harleysville, which refused to defend. Plaintiff and Black Diamond settled the underlying matter, agreeing that the settlement was to be satisfied entirely from the Harleysville policy. Accordingly, plaintiff filed a citation to discover assets against Harleysville. Plaintiff and Harleysville filed cross-motions for summary judgment. In its motion, Harleysville argued that its GCL policy did not cover breach-of-contract actions alleging only defective work. It contended that the damages plaintiff sought did not result from an “occurrence” as defined by the policy, but were merely the natural and ordinary consequence of faulty workmanship.

¶ 6 Plaintiff’s motion countered that its action sought recovery for damage to other property, including the walls and floor, which was not part of Black Diamond’s work. The trial court granted Harleysville’s motion and plaintiff appeals.

¶ 7 Plaintiff contends that the trial court erred in granting Harleysville summary judgment, because its complaint alleged that Black Diamond’s work damaged property other than the property on which it was working. Specifically, plaintiff notes that the walls and floor were damaged and had

to be replaced, and Black Diamond was not hired to work on those items. Thus, plaintiff concludes, there was an “accident” as defined by the policy and the exclusion for damage to “that particular part of real property” on which the subcontractor is working does not apply. Accordingly, Harleysville had, at a minimum, a duty to defend Black Diamond in the underlying litigation and, because it failed to do so, it is estopped from denying coverage.

¶ 8 Harleysville responds that the underlying suit alleged merely defective workmanship, which is not an “occurrence,” that the floor and walls were part of the room that Black Diamond was working on, and that no other property, such as the homeowner’s personal property or the property of adjacent homeowners, was damaged.

¶ 9 Resolution of this issue requires us to construe the Harleysville policy. The construction of an insurance policy is a question of law that can be appropriately disposed of through summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). In construing the policy, the court must ascertain the contracting parties’ intent as expressed in the agreement. *Id.* In doing so, we construe the policy as a whole and consider the risk undertaken, the subject matter insured, and the contract’s purpose. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Unambiguous words must be given their plain, ordinary, and popular meaning, whereas words that are susceptible to more than one reasonable interpretation are ambiguous and will be construed in favor of the insured and against the insurer that drafted the policy. *Id.* at 108-09.

¶ 10 An insurer’s duty to defend its insured is much broader than its duty to indemnify the insured. *Id.* at 125. A duty to indemnify arises only if the insured has a judgment against it on any underlying claim and the insured’s activity and the resulting loss or damage *actually* come within the policy’s

coverage. *Id.* at 127-28. By contrast, the precursor duty to defend arises if, liberally construing in the insured's favor the allegations in the underlying complaint against the insured, there are factual allegations that even *potentially* fall within the coverage. *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154-55 (2005). Moreover, if the underlying complaint against the insured contains several theories of recovery and only one of the theories is potentially covered, the insurer must still defend the insured. *Id.* at 155. Thus, the insurer may become obligated to defend against causes of action and theories of recovery that the policy does not actually cover. *Illinois Masonic Medical Center v. Turegum Insurance Co.*, 168 Ill. App. 3d 158, 162 (1988).

¶ 11 Here, the policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general conditions.” The policy does not define “accident,” but this court has defined the term as “an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character.” *Westfield National Insurance Co. v. Continental Community Bank & Trust Co.*, 346 Ill. App. 3d 113, 117 (2003); see also *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 42 (2005); *State Farm Fire & Casualty Co. v. Tillerson*, 334 Ill. App. 3d 404, 409 (2002); *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill. App. 3d 697, 703 (1996); *Indiana Insurance Co. v. Hydra Corp.*, 245 Ill. App. 3d 926, 929 (1993); *Travelers Insurance Cos. v. P.C. Quote, Inc.*, 211 Ill. App. 3d 719, 726 (1991); Black's Law Dictionary 15 (8th ed.2004) (defining “accident” as “[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated”).

¶ 12 Most of the Illinois cases on point include the admonition that the “natural and ordinary consequences of an act do not constitute an accident.” See, e.g., *Monticello Insurance Co.*, 277 Ill. App. 3d at 703. Thus, Illinois considers construction defects not to be an accident or occurrence necessary to trigger coverage under a CGL policy. In *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731 (2008), the court held that damage to the underlying plaintiffs’ home was not an “occurrence” under the defendant’s GCL policy. Cracks in the home were not an unforeseen occurrence that would qualify as an “accident,” but were the natural and ordinary consequence of defective workmanship. The court noted that defective workmanship could still be covered if it damaged some other property, but there the faulty work had damaged only the home itself. *Id.* at 753.

¶ 13 The *Stoneridge Development* court relied on *American Fire & Casualty Co. v. Broeren Russo Construction, Inc.*, 54 F. Supp. 2d 842 (C.D. Ill. 1999). There, a defective insulation system allowed water to leak into a building, damaging the drywall and ceiling tile. The court held that the only damage was to the building the contractor worked on, not to “other property.” *Id.* at 849. Similarly, in *Viking Construction*, there was no “occurrence” when a subcontractor’s defective work necessitated removing and repairing other parts of the building on which the subcontractor had not worked. *Viking Construction*, 358 Ill. App. 3d at 53-54.

¶ 14 Here, as in the above-cited cases, the only damage was to the building on which Black Diamond worked. Plaintiff argues that Black Diamond worked only on the plumbing and electrical components of the project so that the damage to the floor and walls constituted damage to “other property.” *American Fire*, which *Stoneridge* cited with approval, flatly refutes such a contention. There, the contractor provided only insulation, but the walls and ceiling were damaged. The court

made clear that “other property” does not include any part of the building on which the contractor worked. Similarly, in *Stoneridge Development* and *Viking Construction*, the defective work damaged other parts of the same building but was not considered damage to “other property.”

¶ 15 *Pekin Insurance Co. v. Richard Marker Associates, Inc.*, 289 Ill. App. 3d 819 (1997), on which plaintiff relies, is distinguishable because the complaint there alleged damage to personal property. The personal property was considered “other property” and not part of the building on which the defendant worked. *Id.* at 823. *Pekin Insurance Co. v. Miller*, 367 Ill. App. 3d 263 (2006), which plaintiff also cites, is also distinguishable. There, a contractor removed trees from the wrong property. Thus, it caused damage to “other property,” rather than the property covered by the underlying contract. *Id.* at 268.

¶ 16 Finally, *Minergy Neenah, LLC v. Rotary Dryer Parts, Inc.*, No. 05-CV-1181, 2008 WL 1869040 (E.D. Wis. 2008), does not compel a different result. There, workers replacing steam tubes in a large commercial dryer started a fire that damaged another part of the dryer on which they were not working. In denying the insurer’s motion for summary judgment, the court there did not consider the initial question whether the fire was an “occurrence,” instead holding that the part of the dryer that was damaged was at least arguably “other property.” Had the issue been squarely presented, the fire might well have been considered an “occurrence,” because it arguably was not a natural and ordinary consequence of faulty workmanship. In any event, *Minergy*’s discussion of the “other property” issue appears inconsistent with the great weight of authority in Illinois, much of which is discussed above. To the extent it is inconsistent with those cases, we decline to follow it.

¶ 17 Accordingly, we affirm the judgment of the circuit court of Kane County.

¶ 18 Affirmed.