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THE REGENTS OF THE MERCERSBURG COLLEGE, Plaintiff,
v. GLEN FALLS INSURANCE COMPANY,
TRAVELERS INDEMNITY COMPANY,
PENNSYLVANIA MANUFACTURER'S ASSOCIATION
INSURANCE COMPANY,
REPUBLIC-FRANKLIN INSURANCE COMPANY,
and VALIANT INSURANCE COMPANY, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania
Franklin County Branch
Civil Action - Law, No. 2002-2129, Jury Trial Demanded

Motion for summary judgment; Insurance; Humidity and mold; Bad faith

1. All-risk insurance policies provide the maximum possible protection for the insured. Where full discovery has not yet been conducted as to the nature of the alleged loss to the insured's premises, fact questions exist which make summary judgment inappropriate.

2. Summary judgment is inappropriate where there are factual questions as to when an insured discovered, or reasonably should have discovered, the nature and extent of the damage to its premises.

3. Where an insured alleges that its insurer acted in bad faith in denying the claim, but the complaint and current record present no factual or theoretical grounds to support that allegation, and there is no indication of the possibility that any additional facts could be revealed through discovery to support a bad faith claim, it is appropriate for the court to enter summary judgment as to that claim.

Appearances:

Michael R. Libor, Esq., Counsel for Plaintiff

Steven J. Polansky, Esq., Counsel for Defendant Republic-Franklin Insurance Company

OPINION

Herman, J., June 22, 2004

Introduction

Before the court is a motion for summary judgment filed by defendant Republic-Franklin Insurance Company ("Republic") to plaintiff's complaint which seeks to hold Republic liable under an insurance policy for losses from mold and/or mildew damage occurring in a building at plaintiff's educational facility. Plaintiff answered the motion, these two parties filed briefs, and the court held oral argument. The matter is ready for decision.[1]

Background

Plaintiff operates a private school in Mercersburg, Pennsylvania. Irvine Hall is one of the school's classroom buildings. Plaintiff hired a contractor in 1992 to renovate and add to Irvine Hall. The work included a new HVAC system and was completed in 1994.

According to the complaint, plaintiff began to notice high levels of humidity in Irvine Hall during the summer starting in 1994. The problems allegedly caused damage to the building. Irvine Hall continued to have humidity and condensation problems in the following years. Plaintiff hired various professionals

between 1995 and 1998 to try to fix these problems, but those efforts were not entirely successful. On November 30, 2001, an indoor air quality testing service concluded Irvine Hall was contaminated with microbial growth caused by abnormally high levels of humidity. Plaintiff arranged for a full bioremediation and related repairs to the building in June 2002.

Plaintiff paid premiums on three successive policies issued by Republic between July 1, 1997 through August 1, 2000. Once plaintiff received the air quality report in November 2001, it provided Republic with a formal notice of claim on May 2, 2002. Plaintiff sought coverage of the costs to investigate the problem, do the remediation, and correct the damage and building's systems, all of which amounts to approximately $2,100,000. Republic denied the claim on July 26, 2002.

Plaintiff filed this suit in October 2002 against Republic and four other insurance companies to whom it paid premiums between 1991 and 2002 to recover losses caused by Irvine Hall's high humidity levels and mold contamination. The complaint requests relief by declaratory judgment, and requests damages for breach of contract and bad faith.

Republic's denial of claim is based on the following: (1) the policies do not cover damages caused by mold, and mold is a type of fungus, according to plaintiff's air quality experts; (2) the loss was not discovered until November 2001, which is past the expiration of the last policy on August 1, 2000. Since the loss did not manifest itself until after August 1, 2000, the loss did not occur within the policy period and there is no coverage; (3) the policy contains a provision which requires a claimant to bring suit no more than two years after any loss occurring within the policy period. Insofar as the loss occurred well before November 2001, plaintiff's suit filed in October 2002 should have been filed earlier.

Discussion

Pennsylvania Rule of Civil Procedure 1035.2 governing summary judgment provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

There is no issue to be submitted to a jury where the record contains insufficient evidence of facts to make out a prima facie case. "The mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to see whether there is a genuine need for a trial...We have a summary judgment rule in this Commonwealth in order to dispense with a trial of a case...where a party lacks the beginnings of evidence to establish...a material issue." Ertel v. Patriot-News Co., 674 A.2d 1038, 1041 (Pa. 1996) (citations omitted). At the same time, the court in reviewing the motion must view the record in the light most favorable to the nonmoving party, and all doubts as to whether there is a genuine issue of material fact must be resolved against the moving party. Pennsylvania State University v. County of Centre, 615 A.2d 303 (Pa. 1992).

The record at this point consists of the pleadings, some discovery materials, and reports from expert witnesses. Full discovery has not yet been undertaken.

The Nature of the Loss

The policies state: "We will pay for direct physical loss of or damage to Covered Property...caused by or resulting from any Covered Cause of Loss." A "Covered Cause of Loss means RISKS OF DIRECT PHYSICAL LOSS" unless the loss is excluded in Section B (entitled "Exclusions") which states: "We will not pay for loss or damage caused by or resulting from any of the following:...Rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself..." This section also states that Republic will not pay as a result of "dampness or dryness of atmosphere; changes in or extremes of temperature...continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more..." Republic argues that the fungus exclusion bars coverage because fungus/mold was the only "Cause of Loss" to Irvine Hall.

Plaintiff responds that the physical damage for which it seeks coverage is not the mold, but damage to interior components of Irvine Hall caused by excess humidity. Such damage includes condensation, discoloration, disintegration and mold growth which has occurred to ceiling tiles, wallboard, pipes, cabinetry finishes, among other things. Specifically, the First Amended Complaint avers:

> Continuously from some point in time not precisely known by Plaintiff to the present, but during the periods under which the Policies provided the applicable coverage, Plaintiff has sustained damage to Irvine Hall, other property within Irvine Hall, and other losses due to elevated humidity within the building, related mold contamination and other physical damage...Elevated humidity levels inside Irvine Hall have caused condensation on interior surfaces, discoloration, odor, decay, weakening, and water damage leading to condensation on interior surfaces.

(First Amended Complaint, ¶30.)

According to plaintiff, the proximate cause of the damage to Irvine Hall was not the fungus, but the high levels of humidity, which in turn caused condensation and water infiltration over a period of time, creating a risk for mold/fungus growth. That risk ripened into actual fungal presence with potentially toxic qualities, according to the air quality report issued by the bioremediation professional in November 2001. The "risk" of physical damage to Irvine Hall occurred each summer during humid conditions during which the HVAC system could not dehumidify the air, and other water infiltration problems occurred, allowing for high humidity conducive to mold growth.

The Republic policies are broad form, all-risk policies which provide the maximum possible protection for the insured. As noted above, the current record consists of the pleadings, some discovery, and reports from expert witnesses, but the parties have not yet conducted full discovery. Insofar as there may be legitimate factual disputes about the exact nature of the loss or losses sustained by plaintiff, summary judgment is not appropriate at this point. DiFabio v. Centaur Insurance Co., 531 A.2d 1141 (Pa.Super. 1987).

Manifestation of Loss

Republic's next argument is that the damage or loss did not manifest itself during the period of coverage of the policy. In other words, the mold/fungus was not detected between 1997 and August 1, 2000, i.e., during any of the three successive policy periods. According to Republic, plaintiff admits that the damage first manifested itself in November 2001 when the air quality professional issued its report and conclusions. Insofar as the last Republic policy expired on August 1, 2000 and the loss did not manifest itself until 16 months later, the loss did not occur until after coverage had expired, according to Republic.

On the other hand, plaintiff avers that "[m]uch of the problem, loss and damage were latent and unknown by Mercersburg. Mercersburg did not learn of the nature, scope and extent of the damage and losses until it obtained the results of a subsequent indoor air quality test that indicated that Irvine Hall was contaminated with mold, including [a potentially toxic] type. (First Amended Complaint, ¶31.) According to plaintiff, the occurrence which triggers coverage is the humidity, not the eventual detection of the mold contamination in November 2001. The humidity is the harmful condition which led to the "Risk of Direct Physical Loss." The humidity was continuous over the summer months when the air-conditioning was in use.

The question is: when is coverage triggered? There are few precedential decisions on this issue. Plaintiff cites J.H. France Refractories Co. v. Allstate Insurance Co., 626 A.2d 502 (Pa. 1993), an asbestos case in which the court held that coverage under a policy may be triggered at several different times: initial exposure, the progression of the problem or condition, or eventual manifestation of the damage whereby the affected person or entity is placed on reasonable notice of the damage. This is also known as the "continuous trigger" or "multiple trigger" theory of liability.

The continuous trigger approach made particular sense in France because the injuries caused by asbestos do not manifest themselves for a long time after the initial exposure. Plaintiff argues that the mold damage at Irvine Hall was latent and continuous for many years, with no single, discrete time when exposure or manifestation can be precisely pinpointed. Also, plaintiff points out that this is not a "manifestation" policy; the policy contains no language about "trigger" points. Rather, the policy provides coverage for any risks of direct physical loss. As noted in the previous section, this is the broadest possible kind of coverage - an all-risk policy.

Republic cites Bostick v. ITT Hartford Group, Inc., 56 F.Supp.2d 580 (E.D. Pa.1999), where the court predicted that Pennsylvania would adopt the manifestation trigger under which, "for insurance purposes, damages 'occur' when they 'first manifest themselves in a way that could be ascertained by reasonable diligence.'" Id. at 584-585. However, Bostick is clearly not precedential authority on this issue and does not mandate that we grant summary judgment at this point, given the broad nature of this insurance policy. [2] In addition, even if we were to apply the manifestation trigger, there is a legitimate factual question as to when plaintiff first discovered or should reasonably have discovered the specific damage to Irvine

Hall, including the full extent of that damage.

Two-Year Suit Limitation

The policy requires that any legal action against Republic be filed no more than two years from the date on which the direct physical loss or damage occurred. Plaintiff maintains that its full knowledge of the nature and extent of the damage came to the fore in November 2001, with plaintiff then filing this action in October 2002 - well within the two-year contractual provision. Also, to answer the question - was suit filed more than two years after the loss or damage occurred - depends to some extent on what "occurred" means, i.e., the trigger analysis discussed above. Republic cites General State Authority v. Planet Insurance Co., 346 A.2d 265 (Pa. 1975), for the proposition that the suit limitation period begins to run from the date of the loss itself, not discovery of the loss.

Republic seems to want it both ways: on the one hand, it asserts that the damage did not "occur" until November 2001, long **after** the final policy expired on August 1, 2000. On the other hand, Republic asserts that the damage occurred long **before** November 2001 in order to support the contention that suit is barred under the two-year suit limitation provision. Either way, the identifiable time of the loss, or when that loss manifested itself, was discovered or should reasonably have been discovered, are unresolved factual questions at this juncture which prevent the court from concluding that plaintiff's action should be dismissed as a matter of law.

Bad Faith

A claim for bad faith derives from 42 Pa.C.S.A. §8371 which provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorneys fees against the insurer.

"Bad faith" by an insurer is any frivolous or unfounded refusal to pay proceeds of an insurance policy, even if that refusal is not fraudulent. The term denotes conduct undertaken for a dishonest purpose and a breach of the duty of good faith and fair dealing through some motive of self-interest or ill will. Hollock v. Erie Insurance Exchange, 842 A.2d 409 (Pa.Super. 2003). To prevail, a plaintiff must show by clear and convincing evidence that the insurer lacked a reasonable basis for denying benefits and that the insurer knowingly or recklessly disregarded its lack of reasonable basis. Id; Terletsky v. Prudential Property & Casualty Insurance Co., 649 A.2d 680 (Pa.Super. 1994).

Plaintiff alleges that Republic engaged in bad faith via the following conduct: (a) failing without just cause or reason to acknowledge and to act reasonably promptly on [plaintiff's] claim; (b) failing without just cause or reason to follow reasonable standards for the prompt investigation and processing of the claim; (c) failing without just cause or reason to affirm or deny coverage of the claim within a reasonable time; (d) not attempting in good faith to effectuate prompt, fair and equitable settlement[s] of the claim; (e) refusing to issue partial payments of amounts admittedly owed under the Republic Policies; and (f) compelling [plaintiff] to initiate this litigation to obtain a declaration of the rights that are due it under the terms and conditions of the Republic Policies. (First Amended Complaint, ¶ 114.)

The record shows that plaintiff sent a notice of claim to Republic on or about May 2, 2002. (Exhibit C attached to the motion for summary judgment.) Republic sent an initial response letter on or about May 30, 2002. (Exhibit D.) Republic denied the claim by way of a detailed letter dated July 26, 2002, less than 90 days from receiving the notice of claim. (Exhibit E.)

We find after reviewing these exhibits that plaintiff's bad faith claim should be dismissed. Republic reacted to plaintiff's notice of claim in fewer than 90 days, and plaintiff presents no factual or theoretical grounds for asserting that three months is an unreasonable delay. Also, Republic's July 26th letter provided more than simply an arbitrary or cursory basis for denying plaintiff's claim - Republic cited to several provisions of the policy which formed the basis for its motion for summary judgment, which was by no means a frivolous motion. Furthermore, neither the complaint nor the record as a whole indicate a possibility that any additional facts could be revealed through discovery to support a bad faith claim. Nor has plaintiff supplied even a theoretical basis for such a claim under section 8371 or its interpretive case authority. Based on the foregoing, the court intends to grant Republic's motion for summary judgment as to the bad faith claim.

ORDER OF COURT

Now this 22nd day of June 2004, the court denies the motion for summary judgment filed by defendant Republic-Franklin Insurance Company to the plaintiff's First Amended Complaint as to the claim for damages for breach of contract, and grants the motion as to the claim for damages for bad faith.

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[1] Aside from Travelers Indemnity Insurance Company, all defendants filed answers, new matter, and cross-claims for contribution and indemnification. Republic's motion for summary judgment is against the complaint, and also against the cross-claims.

[2] The briefs submitted by both these parties contain extensive citations to cases which are not binding on this court. Those materials cannot be dispositive of the issues currently before us in deciding whether plaintiff's suit must be dismissed as a matter of law at this early stage.