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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED
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CLERK OF COURTS
CUYAHOGA COUNTY

SITUSA LLC
Plaintiff

AUTO-OWNERS INSURANCE COMPANY, ET AL
Defendant

Case No: CV-17-877134

Judge: CAROLYN B. FRIEDLAND

JOURNAL ENTRY

89 DIS. W/PREJ - FINAL

MOTION FOR SUMMARY JUDGMENT OF AUTO-OWNERS (MUTUAL) INSURANCE COMPANY, FILED 10/30/2017, IS GRANTED. O.S.J.
COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date

- 89
03/27/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

SITUSA, LLC, Plaintiff, vs. AUTO-OWNERS INSURANCE COMPANY, et al., Defendants.	)	CASE NO. CV-17-877134 JUDGE CAROLYN B. FRIEDLAND ORDER AND OPINION

CAROLYN FRIEDLAND, JUDGE:

Plaintiff Situsa, LLC ("Plaintiff") commenced this instance action against Defendants Kenneth Roye and K & L Construction, LLC for the negligent installation and/or repair of a roof on a commercial building resulting in a leak.[1] Plaintiff also asserted a breach of contract claim against Defendant Auto-Owners Insurance Company ("Auto-Owners") for its denial of Plaintiff's insurance claim arising out of the damage to Plaintiff's personal property.

Currently pending is Auto-Owners' Motion for Summary Judgment, filed 10/30/17, and Plaintiff's Motion for Summary Judgment, filed 01/26/18. The sole and determinative issue is whether or not insurance coverage exists for the alleged water damage to Plaintiff's building and personal property located therein. For the reasons that following, Defendant Auto-Owners' Motion for Summary Judgment is granted and Plaintiff's Motion for Summary Judgment is denied.

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[1] The negligent construction / workmanship claim was resolved through a default judgment against Defendants Kenneth Roye and K & L Construction, LLC.

Plaintiff Situsa, LLC purchased a policy of insurance providing both property and liability coverage for a property located at 22 W. Interstate Street, Bedford, Ohio 44146 ("Premises"). Pursuant to Policy 05780886 ("Policy"), Auto-Owners agreed to "pay for direct physical loss of or damage to Covered Property at the [Premises] caused by or resulting from any Covered Cause of Loss." (Policy at form 6400, at A). Covered Property includes the building, fixtures, and permanently installed machinery, as well as certain personal property located in or on the building. (*Id.* at A.1.a, b, and c). "Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is . . . [e]xcluded . . . [or] [l]imited[.]" (*Id.* at special form 64010, Section A).[2]

Pursuant to the Exclusions, Auto-Owners "will not pay for loss or damage caused directly or indirectly by any of the [listed exclusions] . . . . regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (*Id.* at B.1). Coverage for "loss or damage caused by or resulting from . . . faulty . . . workmanship" is expressly excluded. (*Id.* at B.3.c.2). "However, if an excluded cause of loss results in a Covered Cause of Loss, [Auto-Owners] will pay for the loss or damage caused by that Covered Cause of Loss." (*Id.* at B.3). Moreover, the Policy excludes coverage for loss or damage "to the interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain . . . unless the building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain . . . enters[.]" (*Id.* at C.1.c.1).

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[2] Despite the capital letters, "Risks of Direct Physical Loss" is not defined in the Policy.

On or about July 10, 2016, "the structure and contents . . . suffered water damage as a result of a storm and/or in combination with the negligent, faulty installation of the roof on the insured's commercial structure by co-defendants Kenneth Roye and K & L Construction, LLC." (Comp. at ¶3). It is undisputed that the loss, water damage to property, was the direct or indirect result of "negligent and faulty workmanship" by Defendants Roye and K & L Construction. Jack Harper, Plaintiff's sole and managing member, submitted an affidavit of damages wherein he stated that "Kenneth Roye and his construction company, K & L Construction, LLC, failed to perform the roof replacement in a workmanlike manner, *resulting in damage to the roof itself, and damage to plaintiff, Situsa LLC's, personal property in the building.*" (Harper Affidavit, filed 08/30/17) (emphasis added). Put in terms of the exclusion, the undisputed facts establish that the claimed loss / damage was "caused by or resulting from . . . faulty. . . workmanship."

However, this determination does not necessarily end the coverage analysis. The "faulty workmanship" exclusion contains an ensuing loss provision. An ensuing loss provision acts as an exception to an exclusion and can provide coverage under limited circumstances. Here, the ensuing loss language provides, "if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, [Auto-Owners] will pay for the loss or damage caused by that Covered Cause of Loss." (Policy at special form 64010, B.3). The cost of repair for the defectively installed roof membrane would not be covered under the "faulty workmanship" exclusion. However, according to Plaintiff, the intruding water from the storm was a "Covered Cause of Loss" as it

caused the damage to the Premises' contents, and water-related damage is not specifically excluded. Defendant Auto-Owners does not fully address the ensuing loss language, but reiterates that the source of the water was directly from the faulty workmanship, and consequently is an excluded "Cause of Loss" under the Policy.

Numerous courts have interpreted similar ensuing loss provisions, the results of which have led to two separate interpretations. On the one side, if "the damage came natural[ly] and continuous[ly] from the faulty workmanship, unbroken by any new, independent cause, . . . the exclusion applies and the ensuing loss provision does not." *TMW Enters. v. Fed. Ins. Co.*, 619 F.3d 574, 579 (6th Cir. 2010). This interpretation recognizes the "number of possibilities for last-in-time 'but for' causes of damage are limited only by the imagination" thereby eliminating the exclusion altogether. *Id.* at 576-577. Applying this narrow interpretation would result in no coverage for the ensuing loss. Conversely, under the broader interpretation, if an excluded cause occurs, such as the faulty workmanship here, any ensuing loss which is otherwise covered by the policy will remain covered. *See, e.g., Vision One, LLC v. Philadelphia Indemnity Insurance Co.*, 174 Wn.2d 501, 276 P.3d 300, 307 (Wash. 2012). Pursuant to this interpretation, coverage would exist for an ensuing loss not otherwise excluded.

Both competing interpretations are reasonable leading to a conclusion that the ensuing loss provision in the Policy is ambiguous. Indeed, despite what Defendant now argues, the "coverage position" letter drafted by Auto-Owners applied the second broader interpretation of the ensuing loss language suggesting no coverage for the defective roof, but coverage for the contents. An "[a]mbiguity" in an insurance contract

"exists only when a provision at issue is susceptible to more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, ¶16. "[A]n ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216 (2003). Since an ambiguity will be interpreted against the drafter, the Court will apply the broader interpretation of the ensuing loss language.

"[T]he dispositive question in analyzing ensuing loss clauses is whether the loss that ensues from the excluded event is covered or excluded. If the ensuing loss is also an excluded peril or an excluded loss under the policy, there is no coverage." *Vision One, LLC*, 174 Wn.2d at 518. In other words, the ensuing loss provision in this case will provide coverage so long as the water damage from the rainstorm is not also an excluded peril or loss.

The water damage due to rain is not a "Covered Cause of Loss" under the Policy. The Limitations in the Policy excludes coverage for the loss or damage "to the interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain . . . unless the building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain . . . enters[.]" (*Id.* at special form 64010, C.1.c.1). Plaintiff argues that the Limitation does not apply based on the "unless otherwise stated" language contained in the limitations section. According to Plaintiff, the ensuing loss language is an "otherwise stated" instance removing the application of the rain limitation. However, the ensuing loss language does not expressly state that there is coverage for water damage. Rather, the ensuing loss

language simply allows coverage for losses that are the result of a separate Cause of Loss not otherwise excluded or limited by the Policy. Plaintiff's interpretation is not reasonable as it would allow the ensuing loss exception to swallow the faulty workmanship exclusion and rain limitation. Kenneth Roye and K & L Construction, LLC's "faulty workmanship," the undisputed access point of the rain water, is not a Covered Cause of Loss. The rain Limitation applies and excludes coverage for Plaintiff's damaged personal property because "the building or structure" did not "first sustain[] damage by a Covered Cause of Loss to its roof or walls through which the rain . . . enter[ed]." Therefore, there is no coverage for the loss and damage of Plaintiff's personal property.

There are no genuine issues of material fact surrounding the breach of contract claim (Count One) against Auto-Owners. Accordingly, Defendant Auto-Owners' Motion for Summary Judgment is granted, and Plaintiff Situsa's Motion for Summary Judgment is denied.

There is no just reason for delay.

It is so ordered:

Carolyn B. Friedland

Judge Carolyn B. Friedland

3-27-18

Date