2015 WL 12001272
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United States District Court,
W.D. Washington,
at Seattle.

Chase Construction North West Inc., Plaintiff,
v.
AIX Specialty Insurance Company, Defendant.

CASE NO. C15-19RAJ
|
Signed 06/23/2015

Attorneys and Law Firms

Todd K. Skoglund, Casey & Skoglund PLLC, Seattle, WA, for Plaintiff.

Eric S. Chavez, Mark Edward Mills, Betts Patterson & Mines, Seattle, WA, for Defendant.

Opinion

ORDER

The Honorable Richard A. Jones, United States District Court Judge

I. INTRODUCTION

***1** This matter comes before the court on a motion calendar to address the parties' cross-motions for summary judgment. No party requested oral argument and the court finds oral argument unnecessary. For the reasons stated below, the court GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's motion. The clerk shall TERMINATE the motion calendar (Dkt. # 18), shall DISMISS this civil action, and shall enter judgment for Defendant.

II. BACKGROUND

Plaintiff Chase Construction North West Inc. ("Chase") has sued its insurer, AIX Specialty Insurance Company ("AIX") for breach of the AIX insurance policy ("Policy") that covered Chase from September 2009 to September 2010. Chase asks for a declaration that AIX owes it a defense in a lawsuit now pending in Pierce County Superior Court in which the Oakbrook Country Club Condominium Association ("Oakbrook Association") sued Chase for defective roofing. AIX raises a number of contentions, but the one central to this order is its assertion that a "Condo Exclusion" in the Policy means that it neither owes Chase a duty to defend nor a duty to indemnify. For that reason, it asks the court to grant summary judgment in its favor against not only Chase's breach-of-policy claim, but against Chase's claim that AIX is liable for bad faith and violations of Washington's Insurance Fair Conduct Act ("IFCA").

The facts critical to a resolution of this case come from the complaint that the Oakbrook Association filed in state court in January 2014 ("Oakbrook complaint," Skoglund Decl. (Dkt. # 11), Ex. 2). That complaint describes two contracts, each for a new roof on one of several buildings at the Oakbrook condominiums. The first contract, which Chase proposed in June 2010, was for "a new roof on Building I, which contained multiple residential condominium units and common areas, owned by [the Oakbrook Association] ...." *Id.* ¶ 2.1. The Oakbrook Association accepted that contract and Chase concluded work by September 16, 2010. *Id.* The second contract, which Chase proposed in January 2011, was for "a new roof on Building D, which contained multiple residential condominium units and common areas owned by [the Oakbrook Association]" ...." *Id.* ¶ 2.2. The Oakbrook Association accepted that contract and Chase concluded work by July 2011. *Id.* According to the Oakbrook Association, Chase botched the work badly. Among other things, whereas it had promised to install a "cricket system" made of foam, it installed one made of plywood. *Id.* ¶¶ 2.3, 3.2. The Oakbrook Association discovered condensation under the roof as a result of improper roof venting, as well as water damage to "within the individual condominium units causing water related damage to ceilings and walls and other parts of the interiors." *Id.* ¶ 3.1.

Quite soon after receiving the Oakbrook complaint, Chase tendered it to AIX to demand a defense. AIX responded quickly, denying that it had any duty to defend or indemnify. That denial came in an 18-page February 7, 2014 letter. Among many provisions of the Policy, Chase cited two that are central to the court's decision today. One was what the court will call the "Condo Exclusion":

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> ***2** This insurance does not apply and [AIX] shall have no obligation to provide indemnity or defense against any "occurrence", "bodily injury", "property damage", incidents or "suits" arising from any work or operations performed by you ... in connection with any condominium, townhome, or "new tract housing" project.
>
> This exclusion does not apply to repair or remodel work done on condos or townhomes (or townhouses) if such work is being done under contract with the owner(s) of the single unit being worked on.

Policy at 171.[1] The other was the Policy's main coverage clause, which applies only to "bodily injury" or "property damage" that "occurs during the policy period ...." Policy at 179 (Sect. I, Coverage A, ¶ 1(b)(2)).

Chase disputed AIX's denial, and the parties exchanged correspondence until approximately the end of February 2014. AIX reiterated its refusal to defend or indemnify Chase. So far as the record reflects, the parties stopped communicating with each other, even when the Oakbrook Association filed two amended complaints in the state court lawsuit in April 2014 and October 2014. The differences between the three complaints in the state court lawsuit are minor, at least as they apply to this suit. Chase points to no difference between the complaints that is material to the court's decision today. The court's review of the three complaints suggests no material difference.

On November 18, 2014, Chase wrote AIX again to dispute AIX's denial. AIX responded to the letter on December 2, reiterating the position it has maintained consistently in this lawsuit.

The court now rules that AIX is correct, as a matter of law, that it had no obligation to defend or indemnify Chase. In addition, because Chase fails to demonstrate any other basis for its IFCA and bad faith claim, the court grants summary judgment against those claims as well.

III. ANALYSIS

On a motion for summary judgment, the court must draw all inferences from the admissible evidence in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party must initially show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must then show a genuine issue of fact for trial. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must present probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). The court defers to neither party in resolving purely legal questions. *See Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999).

The issues the parties raise in their motions require the court to interpret the Policy. In Washington, insurance policy interpretation is a legal question. *Overton v. Consolidated Ins. Co.*, 38 P.3d 322, 325 (Wash. 2002) ("Interpretation of insurance policies is a question of law, in which the policy is construed as a whole and each clause is given force and effect."). The court must give the terms of the policy a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id.* (internal quotation omitted). Terms defined within a policy are to be construed as defined, while undefined terms are given their "ordinary and common meaning, not their technical, legal meaning." *Allstate Ins. Co. v. Peasley*, 932 P.2d 1244, 1246 (Wash. 1997). Dictionaries may assist in determining the ordinary meaning of a term. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 511 (Wash. 1990). If policy language on its face is fairly susceptible to two different but reasonable interpretations, ambiguity exists. *Peasley*, 932 P.2d at 1246 (cited in *Petersen-Gonzales v. Garcia*, 86 P.3d 210 (Wash. Ct. App. 2004)); *Allstate Ins. Co. v. Hammonds*, 865 P.2d 560, 562 (Wash. Ct. App. 1994) (ambiguity exists "when, reading the contract as a whole, two reasonable and fair interpretations are possible."). Extrinsic evidence may provide the meaning of an ambiguous term, but only where that evidence shows that both parties to the policy intended a particular meaning. *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Const. Co.*, 951 P.2d 250, 256 (Wash. 1998); *see also Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005) ("If a clause is ambiguous, [a court] may rely on extrinsic evidence of the intent of the parties to resolve the ambiguity."). Because parties rarely negotiate the terms of an insurance policy, there is rarely evidence of the parties' mutual intent as to the meaning of a policy term. Where extrinsic evidence does not resolve an ambiguity, the court must construe the ambiguous term in favor of the insured. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 141 (Wash. 2000); *see also Hammonds*, 865 P.2d at 562 (directing courts to resolve ambiguity against insurer "even where the insurer may have intended another meaning").

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A. AIX Owed Neither a Duty to Defend Nor a Duty to Indemnify.

***3** The parties' central dispute is whether the Condo Exclusion applies to exclude Chase's claim. That dispute requires the court to apply the rules of insurance construction. But, because Chase seeks a defense against the Oakbrook Association's lawsuit, the court must also apply those rules with the duty to defend in mind. An insurer's duty to defend its insured is broader than its duty to indemnify. *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007). The insurer must determine that duty by first looking to the lawsuit filed against its insured. *Id.* An insurer must examine the allegations in the complaint, construe them liberally, and determine whether, if proven, the allegations would impose liability on the insured that the policy would cover. *Id.*; *see also Truck Ins. Exchange v. Vanport Homes, Inc.*, 58 P.3d 276, 281-82 (Wash. 2002). The insurer can look beyond the allegations of the complaint only if they are ambiguous or inadequate, and only if that additional inquiry would benefit the insured. *Truck Ins. Exchange*, 58 P.3d at 282. Because the duty to defend is broader than the duty to indemnify, a ruling that the insurer owes no duty to defend means that the insurer owes no duty to indemnify.

Here, the court considers whether the January 2014 Oakbrook complaint triggered AIX's duty to defend. So far as the record reveals, Chase did not provide any subsequent complaints to AIX until at least late 2014. Regardless, none of the changes in the subsequent complaints would impact the court's analysis of Chase's duty to defend.

1. The Policy Does Not Cover Damage Arising from Chase's Work on Building D.

To begin, the Oakbrook complaint unambiguously establishes that all work Chase performed on Building D occurred in 2011, after the September 2010 expiration of the Policy. The Policy applies only to damage that occurs during the policy period. Chase has not articulated any interpretation of the Policy under which it would apply to work that began and ended after the Policy expired. Chase did not respond to the portion of AIX's motion for summary judgment in which it pointed out that the Policy unambiguously does not cover damage to Building D. Chase also has not offered any evidence that the Oakbrook Association was mistaken when it alleged that all work on Building D occurred after the Policy Period ended. Indeed, Chase itself provided to the court its proposal for work on Building D, a proposal dated January 2011. Skoglund Decl. (Dkt. # 12), Ex. 1. Chase does not suggest that it began work before it offered that proposal. For these reasons, AIX owed neither a duty to defend nor to indemnify as to the Oakbrook Association's claims targeting Chase's work on Building D.

2. The Condo Exclusion Unambiguously Applies to Exclude the Oakbrook Association's Claim From the Policy.

The initial complaint in the Oakbrook Association's lawsuit is not ambiguous. It establishes that the Oakbrook Association is a condominium association, that it accepted two offers to replace roofs on two of its condominium buildings that were comprised of "multiple residential condominium units and common areas," and that its damages arose from defects in the work performed under those contracts. The court now considers whether those allegations describe a claim within the scope of the Condo Exclusion, keeping in mind that the insurer bears the burden of proving the applicability of any exclusion. *Weyerhaeuser*, 15 P.3d at 127. Only where an exclusion "clearly and unambiguously applies to bar coverage" can the insurer decline to defend its insured. *Hayden v. Mutual of Enumclaw Ins. Co.*, 1 P.3d 1167, 1172 (Wash. 2000).

The first sentence of the Condo Exclusion unambiguously applies to the work Chase performed at the Oakbrook condominiums. That sentence declares the Policy inapplicable to occurrences, bodily injury, property damage, incidents, or lawsuits arising from work "in connection" with any condominium. Chase does not dispute that the first sentence, if it stood alone, would exclude its claim from the Policy.

***4** It is the second sentence of the Condo Exclusion on which Chase relies. That sentence makes the Condo Exclusion inapplicable "to repair or remodel work done on condos ... if such work is being done under contract with the owner(s) of the single unit being worked on." Chase contends that in this case, the Oakbrook Association, as "[t]he agent for the owner(s) of the building [,] entered into a single contract with Chase Construction to repair the roof on one unit in the project, or Building I." Pltf.'s Mot. (Dkt. # 11) at 10. In Chase's view, a single building within the Oakbrook condominiums can qualify as a "single unit" within the meaning of the second sentence of the Condo Exclusion, and the Oakbrook Association is the agent for the owners of that "unit." To bolster its argument, it points to a dictionary definition of "unit" providing that a "unit" is either a "single entity" or "any group of things or persons regarded as an entity." A building, in Chase's view, is as

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much a "unit" as any individual residential unit within that building. Chase does not contest that it is plausible to read the Condo Exclusion as AIX reads it –*i.e.*, that work in connection with condominiums escapes the Condo Exclusion only if that work is performed on a single residential unit within a condominium on behalf of the owner or owners of that single residential unit.[2] Instead, Chase contends that its interpretation is plausible, and thus the Condo Exclusion is ambiguous.

The problem with Chase's interpretation of the second sentence of the Condo Exclusion is that it necessarily leads to an interpretation of the Condo Exclusion that no sensible insured would reach. All work done on or within a condominium will be done under contract with the owner or owners of an individual residential unit, a collection of owners of more than one residential unit, or the condominium association (which, in Chase's view, is the agent of the condo owners). Thus, in Chase's view, work on any part of a condo is invariably work "on behalf of the owner or owners," as the second sentence of the Condo Exclusion requires. With that in mind, Chase's interpretation of the Condo Exclusion would make the Exclusion either nugatory or absurd. Imagine, for example, that a single contract had governed Chase's work on both Building D and Building I. Applying Chase's interpretation of the Policy, one of two results obtains. One possible result is that the Policy does not cover the work, because Chase's work would be on more than one "unit" (*i.e.*, building). That result is absurd, because there is no sensible interpretation of the Policy where the same work is covered if it performed to satisfy two separate contracts targeting individual buildings, but not covered if it is performed to satisfy a single contract targeting the same buildings. Alternatively, Chase's interpretation might dictate that the work on the two buildings is covered because a collection of two buildings, like a single building, can be a "unit" by Chase's definition. That result is impermissible, because it either means that the Condo Exclusion never applies (because one could always call the target of the work a "unit"), or it means that the Exclusion applies only to work on the entire condominium complex. Neither construction is a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance," as Washington law requires. *Overton*, 38 P.3d at 325.

The Condo Exclusion unambiguously excludes the claims described in the Oakbrook complaint.[3] That suffices to demonstrate that AIX had no duty to defend. The court notes, moreover, that Chase points to no facts beyond the scope of the complaint that vary from those alleged in the complaint. AIX owes neither a duty to defend nor a duty to indemnify.

***5** The court's disposition today makes it unnecessary to address AIX's assertion that the Policy's exclusion of coverage for damage to Chase's work is an independent basis to deny coverage. Policy at 182 (Sect. I, Coverage A, ¶ 2(l)).

B. AIX Did Not Violate IFCA and Is Not Liable for Bad Faith.

Having resolved Chase's breach-of-policy claim, the court turns to its claim that AIX committed the tort of bad faith and violated IFCA.

Bad faith claims and IFCA claims are similar. An insured's assertion of bad faith against her insurer is a tort claim. *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 503 (Wash. 1992). A denial of coverage is in bad faith if it is unreasonable, frivolous, or unfounded. *Overton*, 38 P.3d at 329-30. Violation of Washington's insurance regulations is evidence of bad faith. *See Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 935 (Wash. 1998). IFCA gives a cause of action to a first-party insured against an insurer who "unreasonably denie[s] a claim for coverage or payment of benefits." RCW § 48.30.015(1).

First, the parties dispute whether IFCA applies in this case. AIX takes the position that IFCA does not apply to a claimant seeking defense or indemnity from a third-party claim, whereas Chase argues otherwise. The court observes that since the parties completed briefing on these motions, the court has ruled in another case that an insured in Chase's position is a claimant entitled to invoke IFCA. *Cedar Grove Composting, Inc. v. Ironshore Specialty Ins. Co.*, No. C14-1443RAJ, 2015 U.S. Dist. LEXIS 71256, at *16-18 (W.D. Wash. Jun. 2, 2015) (noting split decisions from this District's other judges). The court need not reiterate that ruling in this case, however, because Chase has not raised a genuine issue of material fact with respect to its IFCA claim.

With the exception of the statutory standing issue that the court just addressed, Chase barely responded to the portion of AIX's motion for summary judgment addressing bad faith and IFCA. Instead, it asked the court to exercise its discretion via Federal Rule of Civil Procedure 56(d) to continue its consideration of AIX's motion for summary judgment. It argued that its "response to AIX's motion requires significant discovery and expert analysis / testimony." Pltf.'s Reply (Dkt. # 21) at 9. The court does not share that view. AIX's motion for summary judgment required Chase to point out how, in the event the court ruled that AIX owed neither a duty to

defend nor a duty to indemnify, AIX could be liable for bad faith or for a violation of IFCA. Chase did not do so. Rule 56(d) allows the court to delay or defer a ruling on summary judgment while the opposing party develops specified facts. Fed. R. Civ. P. 56(d); *see also Trizuto v. Bellevue Police Dep't*, 983 F. Supp. 2d 1277, 1292 n.5 (W.D. Wash. 2013) (describing obligations of party invoking Rule 56(d)). Although AIX attempted to review Chase's complaint and refute allegations relevant to its bad faith or IFCA liability, AIX did not respond to that aspect of Chase's motion. The court concludes that Chase has failed to identify a genuine dispute of material fact as to whether AIX is liable for bad faith or for violating IFCA.

IV. CONCLUSION

For the reasons stated above, the court GRANTS AIX's motion for summary judgment and DENIES Chase's motion. The clerk shall TERMINATE the motion calendar the court created on April 3 (Dkt. # 18), shall DISMISS this civil action, and shall enter judgment for AIX.

DATED this 23rd day of June, 2015.

All Citations

Not Reported in F.Supp.3d, 2015 WL 12001272

Footnotes

1 The court cites the version of the Policy at Exhibit 4 to the declaration of Todd Skoglund (Dkt. # 12), using the last three digits of the "CHASE" Bates number stamped at the lower right corner of each page.

2 AIX suggests that extrinsic evidence supports its view of the Policy. It contends that it insured Chase as a "residential remodeling" company, and that the Condo Exclusion covers work on a single residential unit (a form of residential remodeling) but not work on portions of a condominium complex that are commonly owned. Work on common areas, AIX reasons, exposes it to additional risk, risk that it never meant to assume when it insured a residential remodeling company. Because the court ultimately concludes that the Condo Exclusion is not ambiguous, it need not reach the extrinsic evidence. The court notes, however, that AIX offers no evidence that Chase shared its view of the difference between residential remodeling and work on the common areas of a condominium complex.

3 The court grounds its decision today on the plain language of the Policy and the results that would obtain if the court adopted Chase's interpretation of the Policy. The court notes, however, that Chase misplaces its reliance on *Fluke Corp. v. Hartford Accident & Indemnity Co.*, 7 P.3d 825, 831 (Wash. Ct. App. 2000). Chase contends that *Fluke* dictates that AIX is mistaken in its view that a condominium building is not a single "unit." Pltf.'s Mot. (Dkt. # 11) at 10. *Fluke* does not address that issue, even indirectly. The court also need not address the parties' dispute over whether a condominium association owns a condominium or merely acts as the agent of the owners. Pltf.'s Reply (Dkt. # 21) 2-4. The court assumes, purely for purposes of this motion, that Chase is correct that the Oakbrook Association acted as the agent of the owners of the residential units in Buildings I and D. Even with that assumption, Chase's interpretation of the Policy does not withstand scrutiny.

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