IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MID-CONTINENT INSURANCE COMPANY	:	**JULY TERM, 2012**
	:	
v.	:	**NO. 04070**
	:	
VOLPE GENERAL CONTRACTING and NICHOLAS VOLPE and SANDY MARIANI and FRANK J. MARIANI and FRANK MARIANI, INC. and DANIEL P. MARIANI and CASCIA CORPORATION d/b/a RE/MAX TOWN & COUNTRY and BRETT BENDER and GERALD HEBERT	:	**COMMERCE PROGRAM**
	:	
	:	**CONTROL NO. 13031200**

ORDER

AND NOW, this 17th day of April, 2013, upon consideration of the motion for summary judgment of plaintiff, Mid-Continent Insurance Company, and any response thereto, it is hereby

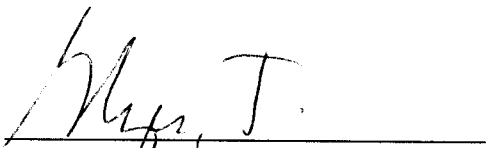
ORDERED

that the said motion is **GRANTED** as follows:

1. The claims and causes of action asserted against Volpe Contracting and Nicolas Volpe in the matter Brett Bender and Gerald Hebert v. Sandy Mariani, et al., venued in the Court of Common Pleas of Philadelphia County at October Term 2011 No. 01723 are not covered by the policies of insurance bearing number 115412-00 and 115412-01; and
2. Mid-Continent Insurance Company does not have a duty to indemnify Volpe Contracting and Nicholas Volpe for the matter Brett Bender and Gerald Hebert v. Sandy Mariani, et

al., venued in the Court of Common Pleas of Philadelphia County at October Term 2011 No. 01723.

BY THE COURT:



GLAZER, J.

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OPINION

GLAZER, J. April 17, 2013

Before the court is the motion for summary judgment of plaintiff, Mid-Continent Insurance Company. For the reasons set for the below, plaintiff's motion is granted.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Mid-Continent Insurance Company, commenced the present action on July 31, 2012 seeking declaratory judgment pursuant to 42 Pa. C.S.A. § 7531. Plaintiff now brings the instant motion for summary judgment and seeks to deny defendants, Volpe General Contracting and Nicholas Volpe ("defendants Volpe"), insurance coverage in an underlying matter, Brett Bender and Gerald Hebert v. Sandy Mariani, et al, C.C.P. Phila, Oct. Term 2011, No. 01273 ("underlying action"). The underlying action was commenced by Brett Bender ("Bender") and Gerald Hebert ("Hebert") against Frank J. Mariani, Sandy Mariani, Frank Mariani, Inc., Daniel P. Mariani, Cascia Corporation d/b/a Re/Max Town & Country and Re/Max Town & Country

Realtors alleging: (1) breach of contractually implied warranty of habitability; (2) breach of Real Estate Seller Disclosure Law; (3) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law; (4) negligence and negligent misrepresentation; and (5) fraud and fraudulent misrepresentation.

Bender and Hebert assert that the defendants in the underlying action conveyed a property, 2240 Pemberton Street, Philadelphia, Pennsylvania ("the property"), to them that had various defects at the time of the agreement of sale, or the closing, or both. Frank J. Mariani and Sandy Mariani acquired and demolished the property in or around January of 2009. When the construction was completed they conveyed the property to Bender and Hebert pursuant to an agreement of sale executed January 10, 2010. In April of 2010, leakage of water from alleged faulty plumbing became evident to Bender and Hebert. Early in February of 2011, Bender and Hebert allegedly found out that the ceiling of their roof was 90% wet and damaged by mold. Consequently, they were forced to move out of the building. Bender and Hebert allege, among other things, that the foundation was built incorrectly, the walls and below ground level were built without sealant which caused seepage and moisture, the roof was constructed incorrectly, plumbing and appliance fixtures were installed incorrectly, drainage channels were installed incorrectly, and that improper weatherproofing of the exterior needed to be removed and replaced. These defects allegedly caused the value of the property to be substantially lower than what Bender and Hebert paid, caused physical symptoms as a result of the exposure to toxic substances, and caused them emotional distress.

Subsequently, Frank J. Mariani, Sandy Mariani, Frank Mariani, Inc., Daniel P. Mariani, Cascia Corporation d/b/a Re/Max Town & Country and Re/Max Town & Country Realtors filed a joinder complaint against defendants Volpe for: (1) common law and contractual contribution

and indemnity; (2) breach of contract; (3) breach of warranty of habitability; and (4) breach of warranty. The joinder complaint claims that a majority of the construction, specifically the portions that Bender and Hebert allege was defective, was actually performed by the subcontractor, defendants Volpe. The joinder complaint further states that Frank Mariani, Inc. entered into a contract with defendants Volpe to construct the townhome on the property and that if the alleged defects actually exist, then defendants Volpe breached the contracts with Frank Mariani, Inc. by failing to properly complete construction of those portions of the townhome.

Initially, plaintiff, Mid-Continent Insurance Company, issued two commercial general liability policies to defendants Volpe. The first policy period was from June 10, 2008 to June 10, 2009, bearing the number 115412-00 ("June 2008 Policy"). The second policy period was June 10, 2009 to June 10, 2010, bearing the number 115412-01 ("June 2009 Policy"). However, the second policy was cancelled on August 7, 2009. Defendants Volpe have now assigned the joinder complaint against them to plaintiff for defense claiming that they are covered by the policies. Plaintiff is currently providing a defense to defendants Volpe. Plaintiff now files the instant motion for summary judgment and based on the discussion below, plaintiff's motion for summary judgment is granted.

DISCUSSION

I. Standard of Review

Once the relevant pleadings have closed, any party may move for summary judgment, "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." Pa. R.C.P 1035.2(1). "Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and

that the moving party is entitled to judgment as a matter of law." Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001).

Declaratory judgment may be invoked to interpret the obligations under an insurance contract. General Accident Ins. Company of America v. Allen, 692 A.2d 1089, 1095 (Pa. 1997). "A carrier's duties to defend and indemnify an insured in a suit brought by a third party depends upon a determination of whether the third party's complaint triggers coverage." Mutual Benefit Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999)(citation omitted). Additionally the obligation to "defend an action brought against the insured is to be determined solely by the allegations of the complaint in the action and ... the company is not required to defend if it would not be bound to indemnify the insured even though the claim against him should prevail in that action." Wilson v. Maryland Casualty Co., 377 Pa. 588, 593, 105 A.2d 304, 306 (1954).

II. The Insurance Policy Does Not Cover the Joinder Complaint Because it is Excluded Under the Policy

Under Pennsylvania law, "when the language of the policy is clear and unambiguous, [we must] give effect to that language." 401 Fourth St., Inc. v. Investors Ins. Group, 879 A.2d 166, 170 (Pa. 2005). The June 2008 Policy specifically states under Exclusions, "[t]his insurance does not apply to ... 'Property Damage' to ... [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." See plaintiff's complaint, Exhibit A, pp. 4-5, Section I, ¶ (2)j(6). Further, "your work" under the June 2008 Policy provides the definition which states, "'Your Work' a. means: (1) work or operations performed by you or on your behalf; and (2) materials, parts or equipment furnished in connection with such work or operations." Id. at Exhibit A, p. 16, Section V, ¶ 22. The June 2009 Policy is identical in its exclusions to the June 2008 Policy. Id. at Exhibit B. Therefore, when comparing the unambiguous language of the policies which excludes coverage for work or

operations performed by defendants Volpe and the underlying joinder complaint which alleges faulty workmanship, it is clear that the claims fall within the exclusion.

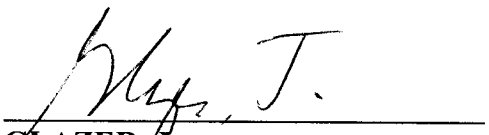
III. The Insurance Policy Does Not Cover the Joinder Complaint Because Faulty Workmanship is not Defined as an "Occurrence" under Pennsylvania Law

The June 2008 and June 2009 policies state, "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Id. at Exhibit A, p. 1, Section I, ¶ 1(a); Exhibit B, p. 1, Section I, ¶ 1(a). Further, "[t]his insurance applies to 'bodily injury' and 'property damage' only if: (1) [t]he 'bodily injury' or 'property damage' is caused by an 'occurrence'..." Id. at Exhibit A, p. 1, Section I, ¶ 1(b); Exhibit B, p. 1, Section I, ¶ 1(b). The policies define an occurrence as, "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Id. at Exhibit A, p. 14, Section V, ¶ 13; Exhibit B, p. 14, Section V, ¶ 13. Under Pennsylvania law, "the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based on faulty workmanship." Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317, 335 (Pa. 2006). Therefore, the claims in the underlying action are not covered by the policies.

CONCLUSION

Based on the foregoing, summary judgment is granted in favor of plaintiff, Mid-Continent Insurance Company. Further, it is hereby declared that the claims asserted in the underlying action, Brett Bender and Gerald Hebert v. Sandy Mariani, et al., venued in the Court of Common Pleas of Philadelphia County at October Term, 2011 No. 01723, are not covered by the June 2008 Policy or June 2009 Policy and Mid-Continent Insurance Company does not have a duty to defend or duty of indemnify Volpe Contracting and Nicholas Volpe in that matter.

BY THE COURT:



GLAZER, J.