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

CALFAYAN CONSTRUCTION ASSOCIATES, INC.,	:	
Plaintiff	:	**JANUARY TERM, 2013** **No. 00256**
v.	:	**Control No. 13022846**
ERIE INSURANCE EXCHANGE, LAURA RAYMOND, and DAN GARAFALO	:	
Defendants.	:	

ORDER

AND NOW, this 27th day of March, 2013, upon consideration of the Preliminary Objections of Defendant Erie Insurance Exchange, and Plaintiffs' Opposition thereto, it is hereby ORDERED that said Preliminary Objections are SUSTAINED. Plaintiff's Complaint is DISMISSED, in accordance with the accompanying memorandum opinion.

BY THE COURT:

ALBERT JOHN SNITE, JR., J.

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	:	
Defendants.	:	

MEMORANDUM OPINION

By: Honorable Albert John Snite, Jr.

PROCEDURAL HISTORY

Before the court are the Preliminary Objections of Defendant Erie Insurance Exchange (herein "Erie") to the Complaint, which were filed on February 21, 2013.

Plaintiff Calfayan Construction Associates, Inc. (herein "Calfayan") filed an Answer in Opposition to the Preliminary Objections on February 26, 2013.

Erie filed a reply memorandum in support of its preliminary objections on March 8, 2013.

FACTUAL HISTORY

The current litigation is a breach of contract, declaratory judgment, and bad faith action that arises from an underlying lawsuit filed by Laura Raymond and Dan Garafolo against

Calfayan, docketed at January Term, 2012, No. 723 (herein the "underlying lawsuit").[1] Raymond and Garafolo were owners of property located at 5047 Hazel Avenue, Philadelphia, PA 19143, and they entered into an Agreement for Project Management Services with Calfayan. The underlying litigation alleges that Calfayan is liable for negligent construction and breach of contract.

For the policy period of January 1, 2011 to January 1, 2012, Erie provided a Fivestar Contractor's policy with commercial general liability coverage to Calfayan.[2] Upon being served with the original complaint in the underlying litigation, Calfayan promptly notified its insurance carrier, Erie, of the event. On February 13, 2012 Erie transmitted a letter denying coverage, stating that the claims do not fall within the Insuring Agreement for the subject policy, "as they do not allege that an occurrence caused property damage during the policy period."[3]

Calfayan now asserts a three-count complaint against Erie: Count I-Breach of Contract, Count II-Action for Declaratory Judgment, and Count III- Bad Faith, Violation of 42 Pa. C.S.A. §8371. Calfayan alleges that Erie had an obligation under the policy to provide a defense in the underlying litigation, and unreasonably refused to defend the action on Calfayan's behalf.

The underlying litigation was placed on deferred status on January 25, 2013 pending disposition in this declaratory judgment action.

DISCUSSION

I am sustaining the current Preliminary Objections, concluding that the underlying complaint fails to allege an "occurrence" within the meaning of the Erie policy, such that the policy has not been triggered and there is no duty to defend. Thus, there is no breach of contract nor bad faith, and the declaratory judgment claim are all properly dismissed.

In order for coverage to be properly triggered under the Erie policy, any "bodily injury" (agreed not at issue here), or "property damage" (at issue here) must be caused by an "occurrence" within the meaning of the policy.[4] The policy provides coverage for an "occurrence," which is defined as "an accident, including continuous or repeated exposure to

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[1] The original Complaint and an Amended Complaint in the underlying action are attached to the current Complaint at exhibits A and B, and are incorporated therein.
[2] The full policy (Policy No. Q25-0121706) is attached to Erie's preliminary objections at Exhibit C.
[3] See Compl. Exh. C.
[4] Policy, CG 00 01 / UF-9708, p. 1.

substantially the same general harmful conditions."[5] Additionally, the policy definitions include: "'Property damage' does not include any loss, cost or expense to correct any defective, faulty or incorrect work performed by you or by any contractors or subcontractors working directly or indirectly on your behalf"[6] (emphasis added).

Our Supreme Court of Pennsylvania has made clear that an insurer's duty to defend and indemnify are to be determined from the language of the complaint against the insured.[7] The Kvaerner court held that faulty workmanship could not establish an "occurrence" under a general liability policy.[8] As the underlying complaint in that case averred only property damage from poor workmanship to the work product itself, and faulty workmanship could not constitute an "accident" to set forth an occurrence, there was no duty to defend.[9]

Here, the underlying complaint alleges at paragraphs 8 and 9:

> 8. A number of issues remain following [Calfayan's] stoppage of work on the Property. These items include the unsatisfactory construction and condition of the roof, unsatisfactory project management, the creation of electrical issues, the need for inspection, repair or replacement of items, the completion of punch list items, the reimbursement of costs incurred to remediate mold conditions and the cost to investigate those conditions, the removal of demolition debris, the repair of items broken by construction personnel, the preparation of documentation related to the certification of the construction under U.S. Green Building Council requirements and reimbursement of other various costs. These items all total well in excess of $50,000.00.
> 9. Owners request the Court to enter judgment in their favor, requiring [Calfayan] to remedy the defective performance, to reimburse Owners for costs Owners have and will have in the future to incur to obtain condition conditions as contracted by Owners and to order that [Calfayan] otherwise provide compensation for items such as loss of use, defective construction and other damages. [10]

This is, simply, a poor workmanship claim, and there are no factual allegations of an "occurrence" in the complaint to include "property damage" under the policy. Instead, as the language of Endorsement UL-TD makes clear, property damage under the Erie policy does not include any loss, cost or expense to correct any defective, faulty or incorrect work performed by

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[5] Policy, Endorsement UL-TD/UF-2973, p. 1.
[6] Id.
[7] Kvearner Metals Div. of Kvaerner U.S., Inc. v. Commerical Union Ins. Co., 908 A.2d 888, 896 (Pa. 2006).
[8] Id. at 899.
[9] Id. at 900.
[10] Underlying litigation Amended Complaint ¶8-9 (attached to current Complaint at Exh. B).

Calfayan or by any contractors or subcontractors working directly or indirectly on Calfayan's behalf.

In Calfayan's reply in opposition to the preliminary objections, it takes the position that the underlying complaint is not only an allegation of poor workmanship, but also an allegation that Calfayan negligently supervised the construction.[11] Calfayan's proposition that this negligent supervision is an independent basis for coverage under the policy is flawed. As noted above, "property damage" to trigger an "occurrence" does not include corrective work by Calfayan or subcontractors working on Calfayan's behalf. Negligent supervision of subcontractors itself therefore does not constitute property damage under the policy.

Applying the unambiguous terms of the policy and the allegations in the underlying complaint, and the Kvaerner rationale, this court holds that the claims fall outside the purview of the Erie policy at issue in this case. While Kvaerner and much of Erie's cited case law stems from summary judgment rulings, it is well established that an insured's duties under an insurance policy are triggered by the language of the complaint against the insured: "the rule everywhere is that the obligation of a casualty insurance company to defend an action brought against the insured is to the determined solely by the allegations of the complaint in the action ...."[12] Therefore, it is apprropriate at the preliminary objection phase to apply the same standard, where the complaint in the underlying action is attached to and incorporated therein in the complaint in the current case. This court is considering the pleadings as attached, and there is no question of fact to be determined. The interpretation of an insurance policy is a question of law,[13] and may be ruled upon at this phase.

Finally, because the court has found that Calfayan is not entitled to coverage under the policy, the bad faith claim cannot proceed.[14]

CONCLUSION

In conclusion, I am of the opinion that there was no "property damage" to be considered an "occurrence" to trigger coverage under the Erie policy. The underlying complaint contains only allegations which require correcting defective, fault or incorrect work and negligent

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[11] Plaintiff's Reply Memo. pg. 4.
[12] Kvaerner, 908 A.2d at 896 (citations omitted).
[13] Id. at 897 (citations omitted).
[14] See Frog, Switch & Mgf., Co. v. Travelers Ins. Co., 193 F.2d 742 (3d Cir. 1999).

supervision. Under the clear terms of the policy, the claim is outside the scope of the policy, and therefore the preliminary objections must be sustained and the complaint dismissed.

BY THE COURT:

DATE: March 27, 2013

ALBERT JOHN SNITE, JR., J.