

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

DOCKETED

OLDE GLORY BUILDERS, LLC,	:	August Term 2014	FEB 26 2016
THOMAS SONTAG, and TRAVELERS HOME	:		
MARINE INSURANCE COMPANY a/s/o	:	No. 3378	R. POSTELL
THOMAS SONTAG,	:		COMMERCE PROGRAM
	:		
Plaintiffs,	:	Commerce Program	
	:		
v.	:		
DONEGAL MUTUAL INSURANCE COMPANY,	:	Control Nos. 15100156/	
d/b/a DONEGAL INSURANCE GROUP,	:	15092464	
	:		
Defendants.	:		
	:		

ORDER

AND NOW, this 26th day of February 2016, upon consideration of the Parties' Cross Motions for Summary Judgment, the responses in opposition and in accord with the Memorandum Opinion attached to this order, it hereby is **ORDERED** that Plaintiffs' Motion for Summary Judgment is **Granted** and Defendant's Motion for Summary Judgment is **Denied**.

It is further **ORDERED** and **DECREED** that Donegal Mutual Insurance Company d/b/a Donegal Insurance Group owed a duty to defend Plaintiff, Olde Glory Builders, LLC with respect to the civil action filed in this court and captioned the *Travelers Home and Marine Ins. Co. a/s/o Thomas Sontag v. Olde Glory Builders, et. al.*, 1401-1898 consolidated with *Thomas Sontag v. Olde Glory Builders et.al.*, 1309-3389. Defendant shall compensate Olde Glory for attorney fees and costs incurred in defending *Travelers Home and Marine Ins. Co. a/s/o Thomas Sontag v. Olde Glory Builders, et. al.*, 1401-1898.

BY THE COURT,


PATRICIA A. McINERNEY, J.

Olde Glory Builders Llc-ORDOP



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MARINE INSURANCE COMPANY a/s/o	:	No. 3378
THOMAS SONTAG,	:	
Plaintiffs,	:	Commerce Program
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d/b/a DONEGAL INSURANCE GROUP,	:	15092464
Defendants.	:	
	:	

OPINION

This is an insurance coverage action. Thomas Sontag (“Sontag”) was the owner of a three-story residential home located at 835 North Lawrence Street, Philadelphia, Pa. Sontag purchased the home from Olde Glory on September 30, 2011. The home was built by Olde Glory on or about 2011. Travelers Home and Marine Insurance Company (“Travelers”) issued an insurance policy to Thomas Sontag which provided coverage for the home and its contents for the policy years 2011-2012 and 2012-2013. Olde Glory hired various subcontractors including Cooper Roofing and Philadelphia Green Roofs to design and install a green roof system on the home. Donegal Mutual Insurance Company d/b/a Donegal Insurance Group (“Donegal”) issued a Tradesman Advantage Contractors’ Policy to Olde Glory that included Comprehensive Business Liability coverage for the periods December 13, 2010 to December 13, 2011 and December 13, 2011 to December 13, 2012.

During the first year that Sontag owned the home, the roof leaked on a number of occasions. Sontag reported the roof leaks to Olde Glory during the first year that he owned the home. Olde Glory failed to detect and correct the problem. On June 8, 2013, the home sustained a significant water loss following a rain storm. The water loss originated on the roof of the home

and caused problems associated with the drains on the roof and the drain at the base of the third floor access stairway to the roof. The water loss caused damage and destruction to the home and its contents. Travelers paid Sontag a sum in excess of \$50,000 for the water loss which allegedly represented the fair and reasonable value of the damage to the home and its contents in accordance with its policy.

Sontag Complaint

In September 2013, Sontag filed a complaint against various contractors including Olde Glory alleging negligent design, construction, sale, service and supervision of work related to the Sontag home and a failure to detect and correct problems which resulted in damage to the home from October 2011 to the time of filing the complaint. (“Sontag complaint”). Sontag alleged that the water infiltration and damage at issue was apparent to him from on or before November 1, 2012. In this suit, Sontag sought to recover those damages not paid by Travelers. In March 2014, Olde Glory provided Donegal notice of the complaint in the Sontag matter and requested coverage pursuant to the policies. On March 13, 2014, Donegal acknowledged receipt of the lawsuit and agreed to defend Olde Glory in the Sontag action under a reservation of rights. Donegal continued to represent defendant Olde Glory in this action.

Travelers Complaint

On January 14, 2014, Travelers Home and Marine Insurance Company, as subrogee of Thomas Sontag, filed a civil complaint against Olde Glory and various contractors alleging negligence in design, construction, sale, service and supervision of work and failure to detect and correct problems which resulted in damage and destruction to the home and its contents. (“Travelers Complaint”). This action was based in subrogation and seeks reimbursement from Olde Glory for the amount Travelers paid Sontag for the damage to the home. The action alleges

that during the first year Sontag owned the home the roof leaked on a number of occasions and that Sontag reported the leaks to Olde Glory.¹ The Travelers complaint further alleged that Olde Glory failed to detect and correct the problem before the home sustained a water loss on June 8, 2013.² On March 14, 2014, Donegal acknowledged receipt of the lawsuit arising from the Travelers complaint and assumed Olde Glory's representation under a reservation of rights.³ On June 13, 2014, Donegal denied coverage to Olde Glory for the Travelers complaint "Because the alleged damage occurred after December 13, 2012 coverage is not triggered under your policy."⁴ Donegal based its denial of coverage on the allegation that the home sustained significant water loss on June 8, 2013.

On May 18, 2014, the Travelers and Sontag matters were consolidated for discovery and trial. The Sontag and Travelers matters were ultimately settled during mediation.

Present Action

Plaintiff Olde Glory Builder, LLC ("Olde Glory") commenced this action by complaint on August 26, 2014 seeking a declaratory judgment and also asserting claims for breach of contract, negligence and bad faith with respect to defendant Donegal Mutual Insurance Company's ("Donegal") denial of coverage for the civil action *The Travelers Home and Marine Ins. Co., a/s/o Thomas Sontag v. Older Glory Builders, et.al.*, 1401-1898. Donegal filed an answer to the complaint, new matter and asserted a counterclaim for declaratory judgment on the

¹ Exhibit "A" to Defendant Donegal's Motion for Summary Judgment – Travelers' complaint ¶¶ 21-22.

² Id. at ¶¶ 23, 35.

³ The Donegal reservation of rights letters for the Sontag and Travelers actions were issued one day apart and respectively reference allegations within the complaints that the roof leaked during the first year Sontag owned the home, 2011-2012. See Plaintiff's Motion for Summary Judgment Exhibit "H" and "I"- reservation of rights letters dated March 13 and 14, 2014.

⁴ Plaintiff's Motion for Summary Judgment Exhibit "J" -June 13, 2014 letter to Olde Glory from Donegal denying coverage.

basis that the Travelers action did not involve an occurrence that took place within the Donegal policy period. On April 30, 2015, Olde Glory filed an amended complaint to add an additional plaintiff and assert a negligence claim. Donegal filed preliminary objections to the amended complaint which were sustained as to the negligence claim only. On July 24, 2015, Donegal filed an answer to the amended complaint once again asserting new matter and counterclaim. On September 4, 2015, the court severed and stayed the bad faith claim. Presently before the court are the parties cross motions for summary judgment on the claim for declaratory judgment and breach of contract.

DISCUSSION

An insurer is obligated to defend its insured if the factual allegations of the complaint on its face encompass an injury that is actually or potentially within the scope of the policy. As long as the complaint “might or might not” fall within the policy’s coverage, the insurance company is obliged to defend.⁵ Accordingly, it is the potential, rather than the certainty, of a claim falling within the insurance policy that triggers the insurer’s duty to defend. The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint.⁶ An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy.⁷ In making this determination, the “factual allegations of the underlying

⁵ *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 606 Pa. 584, 608-09, 2 A.3d 526, 540-41 (2010).

⁶ See, *Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147, 938 A.2d 286, 290 (2007) (“The language of the policy and the allegations of the complaint must be construed together to determine the insurers’ obligation.”).

⁷ See *General Acc. Ins. Co. of America v. Allen*, 547 Pa. 693, 692 A.2d 1089, 1094 (2010) (“[T]he obligation to defend an action brought against the insured is to be determined solely by the allegations of the complaint in the action....”).

complaint against the insured are to be taken as true and liberally construed in favor of the insured.”⁸ The duty to defend is not limited to meritorious actions; it even extends to actions that are “groundless, false, or fraudulent” as long as there exists the possibility that the allegations implicate coverage.⁹

At issue here is whether the facts alleged in the Travelers complaint constitute an occurrence that falls within the Donegal coverage period. The Donegal policy provides coverage when the property damage is caused by an occurrence that occurs within the policy period. In *D’Auria v. Zurich Ins. Co.*, the Pennsylvania Superior Court held that an occurrence takes place when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury.¹⁰ Thus, an “occurrence” happens when injury is reasonably apparent, not at the time the cause of the injury occurs.¹¹ Recently, the Supreme Court in *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John*¹², confirmed this legal rule and held that consistent with the first manifestation rule coverage is triggered under a policy when the injury, whether bodily or property becomes reasonably apparent.¹³

⁸ *Biborosch v. Transamerica Ins. Co.*, 412 Pa.Super. 505, 603 A.2d 1050, 1052 (1992).

⁹ *Erie Ins. Exchange v. Transamerica Ins. Co.*, 516 Pa. 574, 533 A.2d 1363,1368 (1987).

¹⁰ *D’Auria v. Zurich Ins. Co.*, 352 Pa. Super. 231, 238, 507 A.2d 857, 861 (1986) citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56 (1982) (The time at which an “occurrence” occurs must be determined by reference to when the injurious effects of the occurrence took place.).

¹¹ *Id.* at 862.

¹² 106 A.3d 1 (2014).

¹³ *Id.* (Property damage became reasonably apparent in April 2004 when the dairy herd experienced a dramatic drop in milk production and began suffering from higher incidents of farm maladies, not in March 2006 when the farmers noticed the cows thrashing their heads in their drinking troughs and refusing to drink.)

Applying the foregoing to the case at hand, this court must decide, based on the facts alleged in the Travelers complaint, at what point in time the injurious effects of Olde Glory's negligence first manifested itself in a way that could be ascertained by reasonable diligence. As pled in the Travelers complaint, the effects of Olde Glory's alleged negligence first manifested itself during the first year that Sontag owned the home, between 2011 and 2012. Specifically, the Travelers complaint alleges as follows:

12. Plaintiffs insured, Thomas Sontag, purchased the home from Defendant Olde Glory, on or about September 30, 2011....

20. During the first year that Plaintiffs insured, Thomas Sontag, owned the home, the roof leaked on a number of occasions.

21. The roof leaks referenced above were reported to Defendant, Olde Glory, during the first year that Thomas Sontag owned the home.

22. Defendant, Olde Glory, failed to detect and correct the problem(s) which caused the roof leaks at the home.

23. On June 8, 2013, the home sustained a significant water loss following a rain storm.

24. The subject water loss originated on the roof of the home.

25. The water loss was caused by problems associated with the drains on the roof and the drain at the base of the third floor access stairway to the roof.

26. The water loss caused damage and destruction to the home and its content.¹⁴

Consistent with the first manifestation rule articulated in *D'Auria* and confirmed in *St. John's*, coverage exists under Donegal's 2011-2012 policy. It is during this policy period that Sontag's property injury, i.e, leaking roof, became reasonably apparent. As such, Donegal had a duty to defend Olde Glory in the Travelers action under the 2011 to 2012 policy.

¹⁴ Exhibit "A" to Defendant Donegal's Motion for Summary Judgment -Travelers complaint.

CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment is **Granted** and Defendant's Motion for Summary Judgment is **Denied**. Donegal Mutual Insurance Company d/b/a Donegal Insurance Group owed a duty to defend plaintiff, Olde Glory Builders, LLC with respect to the civil action filed in this court and captioned the *Travelers Home and Marine Ins. Co. a/s/o Thomas Sontag v. Olde Glory Builders, et. al.*, 1401-1898 consolidated with *Thomas Sontag v. Olde Glory Builders et.al.*, 1309-3389. Defendant shall compensate Olde Glory for attorney fees and costs incurred in defending *Travelers Home and Marine Ins. Co. a/s/o Thomas Sontag v. Olde Glory Builders, et. al.*, 1401-1898.

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