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

ERIE INSURANCE EXCHANGE, Plaintiff,	:	September Term 2020
v.	:	No. 1174
GLENN M. WHITE BUILDERS, ET.AL., Defendants.	:	Commerce Program
	:	Control Nos. 22040591/22041550

ORDER

AND NOW, this 13th day of September, 2022, upon consideration of Plaintiff Erie Insurance Exchange's Motion for Default Judgment or in the alternative Motion for Summary Judgment against Defendants Smoker Masonry LLC and John D. Smoker Masonry ("Smoker") (cn 22041550) and Motion for Default Judgment or in the alternative Motion for Summary Judgment against Defendant Keys Construction Corp. ("Keys") (cn 22040591), No Responses in Opposition by Smoker nor Keys, Defendant Glenn M. White Builders' Response in Opposition and Plaintiff Erie Insurance Exchange's Reply, it hereby is **ORDERED and DECREED** as follows:

1. Plaintiff Erie Insurance Exchange's Motion for Summary Judgment against Smoker is **Granted**. Plaintiff does not have a duty to defend to defend or indemnify Defendant Smoker in *Glenn M. White Builders, Inc. v. Connelly Stucco & Plastering, Inc. et. al,* Delaware County C.C.P. CV-2019-002671 ("GWB Lawsuit") and the American Arbitration Association actions initiated by various Homeowners in *In re Brickhouse Farms Arbitration.*
2. Plaintiff Erie Insurance Exchange's Moton for Summary Judgment against Keys is **Granted.** Plaintiff does not have a duty to defend or indemnify Defendant Keys in *Glenn*

M. White Builders, Inc. v. Connelly Stucco & Plastering, Inc. et. al, Delaware County C.C.P. CV-2019-002671 ("GWB Lawsuit") and the American Arbitration Association actions initiated by various Homeowners in *In re Brickhouse Farms Arbitration.*

3. Judgment is entered in favor of Plaintiff Erie Insurance Exchange and against Defendants Smoker and Keys.

BY THE COURT,

NINA WRIGHT PADILLA, S.J.

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

ERIE INSURANCE EXCHANGE, Plaintiff,	:	September Term 2020
v.	:	No. 1174
GLENN M. WHITE BUILDERS, ET.AL., Defendants.	:	Commerce Program
	:	Control Nos. 22040591/22041550

OPINION

This is an insurance coverage dispute. Presently before the court are Plaintiff Erie Insurance Exhange's ("Erie") respective Motions for Default Judgement or in the Alternative Summary Judgment against Defendant Keys Construction Corp. ("Keys") and Smoker Masonry LLC and John D. Smoker d/b/a Smoker Masonry (collectively "Smoker"). For the reasons discussed below, Erie's Motions for Summary Judgment are Granted. Erie does not owe Defendants Keys or Smoker a duty to defend or indemnify in *Glenn M. White Builders, Inc. v. Connelly Stucco & Plastering, Inc. et. al,* Delaware County C.C.P. CV-2019-002671 ("GWB Lawsuit") and the American Arbitration Association actions initiated by various Homeowners in *In re Brickhouse Farms Arbitration.*

Underlying Action

Defendant Glenn M. White Builders ("GWB"), a builder, developer, and general contractor, was responsible for the construction of homes at the Brickhouse Farms Development ("Project"). During construction, GWB hired various subcontractors.[1] On August 1, 2005, March 3, 2007, February 11, 2008 and May 1, 2014, GWB contracted with Smoker to install the

[1] Complaint ¶ 37.

stone veneer systems on the houses.[2] On August 1, 2005, GWB contracted with Keys to install the roofing and siding systems on the houses. [3] The respective contracts required Keys and Smoker to procure liability insurance. [4] Keys and Smoker procured liability insurance through Erie.

From September 2018 through February 25, 2020, Homeowners from the project filed demands for arbitration with the American Arbitration Association in Philadelphia asserting construction defects. [5] The Homeowners alleged in their demands for arbitration that GWB and its subcontractors engaged in faulty and/or defective work in the construction of their homes including problems with the installation of the stone veneer, improper placement of the weep holes, improper integration of wood decorative material into the stone masonry and a failure to install a draining system. Additionally, the Homeowners alleged problems with the installation of the siding and roofing systems, improper installation of the soffits, failure to install a kick-out flashing, and a failure to use the proper type of flashing. According to the Homeowners, they suffered damages as a result in the form of significant water infiltration, water damage, mold and other damage to the exterior and interior of the houses.[6] Home inspections revealed moisture penetration indicative of pervasive defects in the construction of the property and that the labor and material used by GWB and its subcontractors including Smoker and Keys did not comply

---

[2] Complaint. ¶ 39.

[3] Id. ¶ 40.

[4] Id. ¶ 41.

[5] Id. ¶ 42-87.

[6] Id. ¶ 43.

with Federal, State and Local building codes, industry standards, marketing materials, contracts and warranties.[7]

The Homeowners asserted claims for breach of contract, breach of implied warranties of habitability and workmanlike construction, negligence, misrepresentation, violation of the UTPCPL and the PA Real Estate Disclosure Law. GWB settled some of the claims and others are pending.[8] On February 21, 2019, GWB filed a joinder demand for arbitration against the subcontractors including Smoker and Keys in some of the Homeowner's arbitration matters seeking a defense and indemnification for their faulty/defective work. [9] Additionally, on February 21, 2020, GWB filed a complaint against Keys and Smoker and other subcontractors in Delaware County compelling arbitration and for contractual defense and indemnification. The action is captioned *Glenn M. White Builders, Inc. v. Connelly Stucco & Plastering, Inc. et. al.*, Delaware County C.C.P. docket no. CV 2019 002671. These matters will be referred to herein as the "underlying actions".

Erie denied GWB's demands for defense and indemnification for the underlying actions as an additional insured under the Keys and Smoker policies. Erie denied Keys' demand for defense and indemnification in the underlying actions, however Erie is providing a defense to Smoker subject to a full reservation of rights for claims against Smoker in the underlying actions.

---

[7] Complaint ¶ 47-51 including Exhibits "E" through "H'' of the Complaint.

[8] Id. ¶ 54, 60.

[9] Id. ¶88-95.

Erie Insurance Policies

Smoker Policy

Erie issued a Five Star Contractor's Policy to Smoker bearing policy number Q27 3021333 effective from March 30, 2018 through March 30, 2019. ("Smoker Policy"). [10] The policy provides as follows:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damage. However, we will have no duty to defend the insured against any "suit" seeking damages for ... "property damage" to which this insurance does not apply....
>
> b. This insurance applies to ... "property damage" only if:
>
> 1) The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory...."[11]

The policy defines an "occurrence" as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions...." [12] The Erie policy issued to Smoker also includes Endorsement UI-TD (12/09) entitled Amendment of Occurrence Definition for Subcontracted Work. This Endorsement modifies the definition of "occurrence" and "property damage" as follows:

> The definition of "occurrence" in Section V-Definition is deleted and replaced by the following:

---

[10] Exhibit "G" to Plaintiff's Moton filed against Smoker.

[11] Exhibit "G" to Plaintiff's Motion filed against Smoker p 1 of the CGL policy.

[12] Id. at p. 13 and 1.

"Occurrence" means an accident, including continuous or repeated expose to substantially the same general harmful conditions. "Property damage" to "your work" will constitute an "occurrence" if all of the following conditions are met:

1. The "property damage" to "your work" is included in the "products completed-operations hazard."
2. The damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor; and
3. The "property damage" is not expected or intended by you or anyone for whom you are legally responsible.

The following was added to "property damage" in section V- Definitions:

a. "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. [13]

Keys Policy

Erie also issued a General Liability Policy to Keys bearing policy number Q26 1000658 A effective February 10, 2017 through February 10, 2018 which contain similar insuring language as that provided in the Smoker policy. [14] The policy issued to Keys provides the following:

1. Insuring Agreement

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of .... "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for ... "property damage" to which this insurance does not apply....

   b. This insurance applies to ... "property damage" only if:

      1) The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory";... [15]

---

[13] Exhibit "G" to Plaintiff's Motion filed against Smoker p 1 of the CGL policy p. 1.

[14] See Exhibit "H" to Erie's Motion filed against Keys. Erie issued to Keys an Ultraflex Policy of insurance effective June 28, 2011 through February 10, 2012, under policy number Q42 2850606 (the Ultraflex policy). Exhibit "G" to Erie's Motion filed against Keys. On February 10, 2012, Keys was removed as a named insured from the Ultraflex policy. (Erie's Motion ¶ 37).

[15] Exhibit "I" to Plaintiff's Motion filed against Keys.

"Occurrence" is defined under the policy as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions...."[16] Additionally, the Ultraflex Policy includes Endorsement UL-TD (12/09) titled Amendment of Occurrence Definition of Subcontracted Work defines "occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. "Property damage" to "your work" will constitute an "occurrence" if all of the following conditions are met:
>
> 1. The "property damage" to "your work" is included in the "products-completed operations hazard";
> 2. The damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor; and
> 3. The "property damage" is not expected or intended by you or anyone from whom you are legally responsible.[17]

The Endorsement UL-TD also provides that "property damage does not include any loss, cost or expense to correct any defective, faulty or incorrect work performed by you or any contractors or subcontractors working directly or indirectly on your behalf."[18]

Erie also issued to Keys a Commercial General Liability policy which includes a Products/Operations Completed Liability Coverage which provides the following:

> a. We will pay those sums the insured becomes legally obligated to pay as damages because of .... "property damage" included within the "products completed operations hazard" to which this insurance applies....
>
> b. This insurance applies to ... "property damage" only if:
> (1) The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory";...[19]

---

[16] Id.

[17] See, Exhibit "J" to Plaintiff's Motion filed against Keys.

[18] Id.

[19] See, Exhibit "H" to Plaintiff's Motion filed against Keys p. 1.

The Commercial General Liability policy under the Completed Operations Policy defines an "occurrence" as an accident, including continuous or repeated exposure to substantially the same general harmful condition.[20]

This Action

On September 23, 2020, Erie initiated this action by writ of summons against GWB, Smoker and Keys. The writ of summons was personally served on Keys on November 2, 2020. (Exhibit A to the Keys motion). On February 3, 2021, Erie filed a complaint seeking a declaration from this court that Erie does not have a duty to defend or indemnify GWB, Keys or Smoker in the underlying actions. On February 17, 2021, Erie mailed the complaint to Keys. (Exhibit "C"). Keys never filed an appearance or filed a responsive pleading to the complaint. On April 15, 2021, Erie sent a notice of intention to take a default to Keys. Keys did not respond to the notice and on May 27, 2021, judgment by default was entered in favor of Erie and against defendant Keys.

On October 12, 2020, Erie served Smoker with the writ of summons. On March 2, 2021, Erie mailed its complaint to Smoker. Smoker never entered an appearance or filed a responsive pleading to Erie's complaint. On April 15, 2021, counsel for Erie sent a Notice of Intention to Take a Default to Smoker. Smoker did not respond to the notice of intent to take a default. On May 27, 2021, judgment by default was entered in favor of Erie and against Smoker. Now, Erie has filed this motion for the entry of default judgment or in the alternative summary judgment against Keys and Smoker on its declaratory judgment complaint. Erie and Smoker have not filed responses to the respective motions. The matter is now ripe for decision.

[20] See, Exhibit "H" to Plaintiff's Motion filed against Keys p. 1.

DISCUSSION

I. Erie does not have a duty to defend Keys or Smoker because the underlying actions do not allege an occurrence and therefore coverage is not triggered.

In a declaratory judgment action concerning applicable insurance coverage, the court's first step is to determine the scope of the insurance policy's coverage. Next, the court must, ascertain if the allegations in the underlying complaint trigger coverage under the relevant policy. Accordingly, "if the complaint against the insured avers facts that would support recovery covered by the policy, then coverage is triggered, and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover." Moreover, if the insurance company is required to defend the policyholder because coverage has been triggered, then the insurance company is also conditionally obligated to provide the policyholder with indemnification if necessary. [21]

The proper construction and interpretation of an insurance policy and the inclusive language is a question of law for the court to resolve. Accordingly, where a policy provision is unclear and ambiguous, the court must construe the language in favor of the policyholder. On the other hand, where the policy language is clear and free from doubt, the court must give full effect to that policy provision. "Contractual language is ambiguous 'if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" [22] Moreover, in determining whether the policy terms or language is ambiguous or vague, the terms or

---

[21] *General Accident Insurance Co. of America v. Allen,* 547 Pa. 693, 706, 692 A.2d 1089, 1095 (Pa. 1997).

[22] *Madison Construction Co. v. Harleysville Mutual Insurance Co.,* 557 Pa. 595, 606, 735 A.2d 100, 106 (1999).

language in question must be considered in the context of the entire policy and not set apart from the remaining provisions that are clear or free from doubt. [23]

Applying the foregoing principles to the case at hand, it is clear that Erie does not have a duty to defend Keys or Smoker in the underlying actions. The insurance policies issued to Keys and Smoker by Erie clearly state that "This insurance applies to...property damage only if: The ...property damage is caused by an occurrence." An "occurrence" is defined as "as an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Courts have held that property damage that is caused by faulty workmanship, as alleged in the underlying actions, is not an occurrence and consequently no coverage exists.

The seminal case on the issue of whether faulty workmanship constitutes an "occurrence" is *Kvaerner Metals Div. of Kvaerner U.S. Inc. v. Commercial Union Insurance Company*, 589 Pa. 317, 908 A.2d 888 (2006). In *Kvaerner*, a coke battery builder brought an action against its insurance company seeking defense and indemnity in a suit by a steel company after a coke battery was damaged. The steel company alleged in the underlying action that the coke battery did not meet the contract specifications and warranties, or the applicable industry standards for construction and included a list of construction defects and workmanship irregularities. The trial court granted summary judgment in favor of the insurer and denied coverage. The Superior Court reversed, and allocator was granted.

The Supreme Court held that faulty workmanship does not constitute an "accident" as required to set forth an occurrence under insurance policy issued and that the insurer had no duty to defend or indemnify Kvaerner in the suit brought by the steel company. The Supreme Court

---

[23] *Riccio v. American Republic Insurance Co.*, 453 Pa. Super. 364, 373, 683 A.2d 1226, 1231 (1996).

relying upon the dictionary definition of the term "accident" reasoned that "accident" means "unexpected" which implies a degree of fortuity not present in a claim for faulty workmanship. [24] The Court further reasoned that claims of faulty workmanship "do not present the degree of fortuity contemplated by the ordinary definition of 'accident' or its common judicial construction in the context."[25] The court denied coverage finding that to hold otherwise would convert a policy of insurance into a performance bond which the court was unwilling to do since such protections were already available to contractors. [26]

Thereafter, in *Millers Capital v. Gambone*, 941 A.2d 706 (Pa. Super. 2007), relying on *Kvaerner*, the Superior Court held that "claims predicated on faulty workmanship cannot be considered 'occurrences' for purposes of an occurrence based on a CGL policy as a matter of plain language." [27] In *Gambone*, the underlying claim alleged faulty construction due to water leaks that were the result of faulty installation of stucco, windows and artificial seals on the exterior of homes which caused damage to non-defective work inside the home. [28] Gambone argued that since the faulty construction caused damaged to non-defective work, the interior of the home, the water damage to the non-defective work inside the home constituted an occurrence even though the damage to the exterior of the home did not constitute an occurrence. The Superior Court rejected the distinction made by Gambone and held that "damage caused by

---

[24] *Kvaerner, supra* at 897-898.

[25] *Id.* at 899.

[26] *Id.*

[27] *Gambone, surpa.* 715.

[28] *Gambone* at709.

rainfall that seeps through faulty home exterior work to damage the interior of a home is not a fortuitous event that would trigger coverage."[29]

Most recently, the Federal District Court in *Main St. Am. Assur. Co. v. Connolly Contrs., Inc.*, 2022 U.S. Dist. Lexis 34155[30] applied the reasoning of *Kvaerner* to an almost identical situation. In *Mains St.*, an insurance company filed an action to determine if it had a duty to defend and indemnify GWB and one of its subcontractors against actions filed by Homeowners in Brickhouse Farms, the same project at issue here, for faulty construction and water damage. The court on a motion for judgment on the pleadings relying on *Kvaerner* held that a duty defend did not exist because the claims alleged were premised on faulty workmanship which was not fortuitous and did not amount to an occurrence for coverage to apply.

Here, as in *Kvaerner, Gambone and Main St.*, the underlying actions do not allege an accident, including repeated exposure to substantially the same general harmful conditions. The property damage suffered by the Homeowners as alleged in the underlying actions is faulty workmanship by Keys and Smoker and others. Based on the foregoing, the duty to defend is not triggered as there is no occurrence as defined by the respective policies. [31]

While Keys and Smoker have not filed a response to Erie's motions, GWB did file a response arguing the existence of an "occurrence".[32] In support thereof, GWB relies upon

---

[29] *Id.*

[30] While not authoritative and not final as the decision is on appeal, this court finds the reasoning persuasive since the case involves the same insured, the same properties and the same definition of "occurrence".

[31] Because this court finds that the facts in the underlying matters do not trigger coverage because there is no occurrence alleged, the court need not consider whether any exclusions apply to bar coverage.

[32] GWB also argued that Smoker was not properly served with the notice of an intent to take a default and that the motion is premature as discovery is not complete. These arguments lack merit.

Pennsylvania Manufacturers Indemnity Company v. Pottstown Industrial Complex, L.P. 215 A.3d 1010 (Pa. Super. 2019). This court is not persuaded by the reasoning in *Pottstown* and finds the facts to be distinguishable. In *Pottstown,* a commercial landlord was obligated under the terms of the lease to keep the roof "in serviceable condition and repair," and after a storm, the roof leaked and the floods ruined the tenant's merchandise.[33] In the underlying complaint, the tenant alleged that the landlord was required to maintain the roof and the failure to maintain caused the damage. The landlord sought coverage from its insurer and the claim was denied. The Pennsylvania Superior Court held that the trial court erred in extending *Kvaerner's* faulty workmanship analysis to the tenant's claims against the landlord. The court explained, "[T]he Underlying Action alleges damage to other property, [the tenant's] inventory stored on the premises, caused by a distinct event, flooding, and seeks damages for destruction of that property, not for the cost of repairing or replacing the defective item that Insured supplied, the inadequate roof."[34]

Unlike the tenant in *Pottstown* which alleged damage to inventory stored within property by a fortuitous event, flooding, the Homeowners in the underlying action do not allege that their damages were caused by a fortuitous event. Instead, the Homeowners allege their damages were caused by faulty workmanship which is deemed not to be an accident because faulty workmanship lacks that degree of fortuity necessary to be deemed an "occurrence".

Based on the foregoing, Erie does not have a duty to defend Keys and Smoker in the underlying actions.

---

[33] 215 A.3d 1010, 1012 (Pa. 2019).

[34] *Id.* at 1017.

II. No duty to indemnity exists.

Since this court finds that Erie does not have a duty to defend Keys or Smoker, Erie does not have a duty to indemnify. [35]

CONCLUSION

For the foregoing reasons, Plaintiff Erie Insurance Exchange's Motion for Summary Judgment against Defendant Smoker Masonry LLC and John D. Smoker Masonry is **Granted.** Additionally, Plaintiff Erie's Insurance Exchange's Moton for Summary Judgment against Defendant Keys Construction Corp. ("Keys") is **Granted**. Judgment is entered in favor of Plaintiff Erie and against Defendants Smoker and Keys.

BY THE COURT,

NINA WRIGHT PADILLA, S.J.

[35] *Erie Ins. Exchange v. Lobenthal*, 114 A.3d 832, 836 (Pa. Super. 2015).