

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

LEXINGTON INSURANCE COMPANY,	:	January Term 2010
Plaintiff,	:	
v.	:	No. 2142
THE CHARTER OAK FIRE INSURANCE	:	COMMERCE PROGRAM
COMPANY, ET. AL.,	:	
Defendants.	:	Control Nos. 12041865/12041864
	:	
	:	2876 EDA 2012

OPINION

Lexington Insurance Company (“Lexington”) filed the instant appeal from this court’s order dated September 6, 2012 granting summary judgment in favor of North River Insurance Company (“North River”) on the duty to defend and the duty to indemnify. Lexington filed an action against North River Insurance Company (“North River”) and various other defendants alleging in part that North River owed CMX/Schoor Palma (“CMX”) a duty to defend and a duty to indemnify in the case captioned Childs et. al. v. JCP Group, Inc. et. al., August Term 2008 No. 1748 (“Child’s action”). Lexington also alleged North River acted in Bad Faith in violation of Pennsylvania’s Insurance Bad Faith Statute, 42 Pa. C. S. § 8371.

Background

Contract between CMX and the City of Philadelphia Water Revenue Department

On January 31, 2005, the Philadelphia Water Department and Schoor DePalma, Inc. entered into a contract for engineering services on the Dobson Run Storm Relief Tunneling Project (“Project”). Under the terms of the agreement, CMX agreed to provide various engineering professional services including all design submissions. The contract contained an indemnification provision whereby CMX agreed to indemnify, defend and hold harmless the

Lexington Ins Co Vs Charter Oak Fire Ins Co - OPFLD



City from and against any and all losses, costs, claims, suits, actions, damages, liability and expenses, occasioned wholly or in part by CMX's act or omission or negligence or fault.

Additionally, under the terms of the agreement, CMX was required to name the City, its officers, employees and agents as additional insureds on a general liability policy. CMX procured general liability insurance through Hartford Insurance Company ("the Hartford") and also procured a professional services liability policy through Lexington Insurance Company ("Lexington").

The Hartford policy provides:

We 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. 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 "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

The Hartford policy contains the following exclusion for professional services:

This insurance does not apply to "bodily injury" ... arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.

CMX was also insured by Lexington. Lexington issued an Architects & Engineers Professional Liability Policy with limits of \$10,000,000 for each claim. In accordance with the policy, Lexington agreed to pay on behalf of CMX those sums in excess of the Self-Insured Retention (\$250,000) that CMX became legally obligated to pay as loss because of

claims made against it to which the policy applied. The Lexington policy applies to claims arising out of:

1. Breach of Professional Duty in the performance of Professional Services by the Insured or any entity for whom the Insured is legally liable; and
2. Bodily Injury...resulting from Covered Operations performed for others by the Insured or by an entity for whom the Insured is legally liable.

The policy defines “Breach of Professional Duty” to mean “negligence, defined as the failure to meet the professional standard of care legally required or reasonably expected under the circumstances in the performance or non-performance of Professional Services rendered to others by the Insured which results in loss for which the Insured is legally liable.”

“Professional Services” is defined by the Lexington policy to mean “services that the Insured is legally qualified to perform for others in their capacity as an architect, engineer, land surveyor, landscape architect, Agency Construction Manager, or as specifically defined by the by endorsements to this policy. Professional Services shall not include facilities operations and maintenance operations or activities.”

Joint Venture Contracts and Subcontracts

On December 4, 2006, JPC Group, Inc. (“JPC”) and Jay Dee Contractors, Inc. (“Jay Dee”) entered into a Joint Venture Agreement to bid on the Dobson Run Storm Relief Tunneling Project (“Project”) for the City of Philadelphia Water Department. The Joint Venture was known as JPC-Jay Dee. The City of Philadelphia accepted the bid of the Joint Venture and entered into a contract with JPC-Jay Dee, for the project. CMX was not a party to the Joint Venture contract with the City.

On July 27, 2007, the Joint Venture entered into subcontracts with JPC Group, Inc. and Jay Dee respectively. The Subcontracts contained an insurance condition which required JPC Group, Inc. and Jay Dee to procure insurance as required by the General Contract or by law. The

insurance procured was to be primary and was required to include workers compensation, comprehensive general liability, comprehensive automobile and umbrella/excess liability with limits at least equal to the greater of those specified in the contract documents. The Subcontract required JPC Group, Inc. and Jay Dee to name the Joint Venture, the Owner and the Engineer, CMX, as additional insureds on each of the subcontractor's insurance policies for the Project.¹

Subcontractor Commercial General Liability Policy and Umbrella Policy

JPC Group, Inc. procured the required commercial general liability insurance through The Charter Oak Insurance policy. The Charter Oak Insurance Policy insured the Joint Venture and the subcontractors JPC Group, Inc. and Jay Dee. Pursuant to the Subcontract between the Joint Venture and JPC Group, Inc., JPC Group Inc. was to name CMX as an additional insured on the Charter Oak Policy. Although the policy does not specifically identify by name CMX as an additional insured, the Charter Oak Policy, contains a Blanket Additional Insured (Contractors) Endorsement which provides in part as follows:

1. Who is an Insured-(Section II) is amended to include any person or organization that you agree in a "written contract requiring insurance" to include as an additional insured on this Coverage Part, but:
 - a) Only with respect to liability for "bodily injury"...; and
 - b) If, and only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of "your work" to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization.
2. The insurance provided to the additional insured by this endorsement is limited as follows:...
 - b) The insurance provided to the additional insured does not apply to "bodily injury"... arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services, including:

¹Although the Subcontract required the subcontractor to identify CMX as additional insured, the Subcontract did not create any contractual obligation by JPC Group, Inc. and Jay Dee to indemnify and save harmless CMX.

- i. the preparing, approving or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, filed orders or change orders, or the preparing, approving, or failing to prepare or approve, drawing and specifications; and
- ii. Supervisory, inspection, architectural or engineering activities.

....

The Charter Oak policy also contains a professional liability exclusion. The professional liability exclusion states:

- 1. This insurance does not apply to “bodily injury”, “property damage”, “personal injury” or “advertising injury” arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
 - a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
 - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

The Charter Oak policy provides that professional services include:

- a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings or specifications; and
- b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

According to the Charter Oak Policy, Professional Services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

The JCP Group Inc. also procured a commercial umbrella policy through North River. North River issued the commercial umbrella policy to JPC Group, Inc. with the Joint Venture named as a named insured. The North River Policy also provides for a blanket additional insured provision which provides in pertinent part:

The North River policy defines “Insured” as:

any person, organization, trust, or estate that has obligated you by an “Insured Contract” to provide the insurance that is afforded by this policy, but this policy applies

- a. only up to the policy limits required by the “Insured Contract”, subject to the limits of this policy; and
- b. only with respect to “Bodily Injury”, “Property Damage” or “personal and Advertising Injury” that occurs subsequent to the time you enter into the “Insured Contract”; and
- c. only with respect to liability arising out of “Your Work”, “Your Product” or property owned or used by you, or with respect to other liability arising out of your negligence.

An “Insured Contract” is defined as

That part of any other contract or agreement pertaining to your business (including any indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “Bodily Injury” or “Property Damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The North River policy also contains an endorsement excluding coverage for professional services. The endorsement entitled Contractors Limitation Endorsement and Construction

Defect Exclusion provides as follows:

- A. This policy does not apply to “Bodily Injury”, “Property Damage”, “Personal and Advertising Injury” arising out of:....
 2. the rendering or failure to render, architectural, engineering or land survey professional services by or for you, including:
 - a. the preparing, approving or failure to prepare or approve maps, drawings, opinion, reports, surveys, change orders, designs or specifications; and
 - b. supervisory, inspection or engineering services.

The Underlying Action

On September 6, 2007, Albert Childs while riding a bicycle on Kelly Drive at or near the intersection with South Ferry Road in Philadelphia, Pennsylvania was struck by a motor

vehicle. The accident took place in an area where JPC Group, Inc. was performing work under the subcontract with the City. Jay Dee had not commenced work under its subcontract with the City at the time of the accident. Mr. Childs died from his injuries on March 24, 2008.

In August 2008, as a result of the accident, the Administrator of the Estate of Mr. Childs instituted an action in the Court of Common Pleas of Philadelphia County against defendants JCP (subcontractor), Jay Dee Contractors, Inc. (subcontractor), JPC-Jay Dee (general contractor), CMX, Inc. (formerly Schoor DePalma)(engineer), Protection Services, Inc. (consultant) and the City of Philadelphia (owner). This action is captioned Childs et. al. v. JCP Group, Inc. et. al., August Term 2008 No. 1748.²

The Child's complaint alleged that at all times material hereto defendants were jointly and severally liable for the decedent's injuries. The complaint asserts factual allegations against all defendants collectively. The complaint alleges that CMX is a company that provides engineering and construction services including site design and consulting services related to traffic coordination.

The complaint further alleges the following negligence involving design: improperly designing construction areas, including vehicular and non vehicular lanes, failing to properly design and construct travel paths involving the convergence of vehicular and non vehicular traffic, failing to properly design and/or erect a pathway designated for non-vehicular traffic only, designing and/or constructing vehicular and non vehicular pathways that were of an unsafe and inappropriate length and/or width, failing to design, construct and/or maintain proper

² The Childs action was marked settled discontinued and ended on May 24, 2010.

lighting conditions on the property, failing to design, erect and/or maintain traffic control devices directing and regulating the flow of vehicular and non-vehicular traffic.³

JPC –Jay Dee, the joint venture, JPC Group, Inc. and Jay Dee Contractors (collectively referred to as “JPC Defendants”) tendered to and were defended by The Charter Oak Insurance Company. Charter Oak also defended the City of Philadelphia based upon a contractual indemnity provision contained within the contract between the Joint Venture and the City of Philadelphia.

On October 20, 2009, CMX through counsel tendered the defense of the Childs litigation to Charter Oak and North River.⁴ By letters dated October 29, 2009, November 3, 2009 and November 10, 2009, North River denied coverage. North River stated it had no obligation to defend or indemnify CMX unless and until the limits of “Underlying Insurance” and “Other Insurance” as defined by the North River Policy were exhausted by payment of a judgment or settlement. According to North River, since the primary policy issued to JPC and the Joint Venture by Charter Oaks had not been exhausted, North River found it did not have a present duty to defend CMX. North River also denied coverage to CMX based on the Professional Services Exclusion.

In November 2009, the Estate agreed to settle with JPC Group, the Joint Venture and the City. North River funded \$9 million of the \$10 million settlement. On March 18, 2010, Hartford confirmed a January 29, 2010 agreement to share in reasonable and necessary defense costs that were incurred following the date that CMX first gave notice to the Hartford. Hartford denied indemnity coverage relying upon a professional services exclusion within the policy. Lexington paid \$2 million to the Child’s Estate as satisfaction of any claim against CMX.

³ The Child’s complaint ¶¶ 60 a, m, s, t, y, z.

⁴ CMX gave notice of the Child’s action to Lexington in April 2008.

The Instant Action

On January 20, 2010, CMX, Inc. filed a complaint against defendants Charter Oak Fire Insurance Company, North River Insurance Company, JPC-Jay Dee Joint Venture LLP, JPC Group, Inc., Jay Dee Contractors, Inc., The City of Philadelphia, Protection Services, Inc. and Sabrina Childs. The complaint alleged that defendants failed and refused to accept CMX's tender and provide a defense and indemnification in the underlying Child's action. On March 25, 2010, North River filed its answer, New Matter and filed a Cross Claim for indemnity against Sabrina Childs.

On May 16, 2011, the court granted CMX's petition to substitute Lexington Insurance Company in the instant action. Lexington is now the plaintiff in this action and CMX has withdrawn as a party. Lexington discontinued the instant action against Charter Oak Insurance Company, Protection Services, Inc., JPC-Jay, JPC Group, Inc. and JayDee Contractors.⁵ North River filed two motions for summary judgment, a motion for summary judgment on the duty to defend and a motion for summary judgment on the duty to indemnify.

On September 6, 2012, the court granted North River's motions for summary judgment and dismissed Lexington's complaint in its entirety. On September 19, 2012, Lexington filed a motion for reconsideration of this court's order dated September 6, 2012. On October 2, 2012, the court denied the motion for reconsideration. On October 4, 2012, Lexington filed the instant appeal. For the reasons set forth below, this court's order dated September 6, 2012 should be affirmed.

⁵ At or about the time Lexington discontinued the action against defendants JPC-Pay, JPC Group, Inc. and Jay Dee, Lexington and the JPC Jay Dee defendants stipulated to certain facts regarding JPC's expectation of procuring additional insured coverage for CMX under the Charter Oak Policy and the North River Policy.

DISCUSSION

I. North River did not owe CMX a Duty to Defend.

Under Pennsylvania law, the task of interpreting an insurance contract, including an analysis of coverage, is a question of law generally determined by the court. When the terms of the policy are unambiguous, they control, but when the terms are ambiguous they must be interpreted in favor of the insured.⁶

The duty to defend under an insurance policy is broader than a duty to indemnify, in that the duty to defend is triggered whenever the factual allegations in a complaint may potentially come within the insurance coverage. The insurer's duty to defend remains until the insurer is able to show that the factual allegations in the complaint, even if true, do not fall within the scope of the policy. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time as that claim is confined to a recovery that the policy does not cover.⁷

In determining whether a duty to defend exists, the Pennsylvania Supreme Court has held:

[a]n insurer's duty to defend an action against the insured is measured, in the first instance, by the allegations in the plaintiff's pleadings...In determining the duty to defend, the complaint claiming damages must be compared to the policy and a determination made as to whether, if the allegations are sustained, the insurer would be required to pay the resulting judgmentThe language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation.⁸

⁶ Gen. Accident Ins. Co. of Am. v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (1997).

⁷ *Id.*

⁸ Donegal Mut. Ins. v. Baumhammers, 595 Pa. 147, 155, 938 A.2d 286, 290 (2007).

Where an insurer relies on a policy exclusion as the basis for its denial of coverage and refusal to defend, the insurer has asserted an affirmative defense and, accordingly, bears the burden of proving such defense.⁹

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."¹⁰ Whether a particular loss falls within the coverage of an insurance policy is a question of law to be decided by a court on a motion for summary judgment in a declaratory judgment action.¹¹

In the case *sub judice*, North River argues it had no duty to defend CMX in the underlying Child's litigation because the limits of "Underlying Insurance" had not been exhausted by payment of settlement or judgment.¹² Upon review of the record, the court finds that at the time CMX tendered to North River, the Charter Oak Policy and the Hartford Policy were not exhausted. The North River policy specifically conditions its defense and obligation upon the exhaustion by payment of settlements and judgments of all "Underlying Insurance" and "Other Insurance". The North River Policy specifically provides:

We will have the right and duty to defend the Insured against any "Suit" seeking damages....covered by the terms and conditions of this policy, even if the allegations are groundless, false or fraudulent when:

⁹ *Id* (quoting Madison Constr. Co. v. Harleysville Mut. Inc. Co., 557 Pa. 595, 735 A.2d 100, 106 (Pa. 1999)).

¹⁰ Pa. R. Civ. P. 1035 (b).

¹¹ Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 533 A.2d 1363 (1987).

¹² North River also argues it owes CMX no duty to defend because CMX is not an additional insured under the policy. Based on the subcontract between the Joint Venture and JPC Group, Inc. which required JPC Group to name the Engineer, CMX as an additional insured on each of the Subcontractor's insurance policies for the project, the court finds that CMX is an additional insured. See Exhibit "H" to North River's Motion for Summary Judgment section 10, Insurance.

1. the applicable limits of “Underlying Insurance” and “Other Insurance” have been exhausted by payment of judgment or settlements;¹³

Pursuant to the North River policy definitions, the Charter Oak Policy constituted “Underlying Insurance.” At the time CMX tendered its defense to North River, the Charter Oak policy was not exhausted. The record demonstrates CMX tendered its defense on October 20, 2009. Charter Oak did not pay its limit of indemnity until January 26, 2010.

Moreover, North River’s duty to defend not only required the exhaustion of “Underlying Insurance”, but also required the exhaustion of “Other Insurance”. As defined by the North River policy, the Hartford policy constituted “Other Insurance”.¹⁴ Hartford, although agreeing to pay some defense costs associated with CMX’s defense, denied coverage based on the Engineers, Architects or Surveyors Professional Liability Exclusion. In order for North River to provide a defense, Hartford would have had to exhaust its limits by payment of judgment or settlement. Since Hartford denied coverage, the requirement of exhaustion by payment of judgment or settlement never occurred. Consequently, North River did not owe CMX a duty to defend it in the Child’s action.

Notwithstanding the foregoing, the North River Policy also contains a Professional Services Exclusion which excludes “Bodily Injury...due to rendering or failure to render any professional services.” Professional service includes but is not limited to preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, design or specifications, engineering services, including related supervisory or inspection services. A review of the Child complaint demonstrates the acts attributed to CMX are those related to

¹³ Exhibit “C” North River’s Insurance Policy- North River’s Motion for Summary Judgment NR000642-644.

¹⁴ The Lexington policy does not constitute “Other Insurance” because it provides coverage for a risk different than the CGL and the Commercial Umbrella policies.

providing designs and engineering services. As such, North River did not have a duty to defend since the professional service exclusion applies and North River's motion for summary judgment on the duty to defend was granted.

II. North River did not owe CMX a Duty to Indemnify.

Lexington also alleged North River owes CMX a duty to indemnify. As set forth above, the duty to defend is broader than the duty to indemnify.¹⁵ As such, a finding that a duty to defend does not exist precludes a duty to indemnify.¹⁶ Although the duty to defend is separate and apart from and broader than the duty to indemnify, both duties flow from a determination that the complaint triggers coverage.¹⁷ Thus, since North River did not have a duty to defend CMX in the underlying action, neither did it have a duty to indemnify. Accordingly, North River's Motion for Summary Judgment on the duty to indemnify was granted.

III. Lexington's claim for bad faith must also be dismissed.

Lexington also asserted a statutory claim for bad faith under 42 Pa C.S. § 8371 against North River based on its alleged failure to undertake a reasonable investigation of CMX's claim. To succeed with such a bad faith claim, Lexington must prove by clear and convincing evidence that North River (1) did not have a reasonable basis for denying benefits under the insurance policy and (2) knew or recklessly disregarded their lack of a reasonable basis in denying the claim.¹⁸ An insured may prove that the insurer knew or recklessly disregarded its lack of a reasonable basis

¹⁵ General Accident Insurance Co. v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (Pa. 1997).

¹⁶ Scopel v. Donegal Mutual Insurance Co., 698 A.2d 602, 605 (Pa. Super. 1997).

¹⁷ General Accident Insurance Co. v. Allen at 1095.

¹⁸ Condio v. Erie Insurance Exchange, 899 A.2d 1136, 1142-43 (Pa. Super. 2006); Terletsky v. Prudential Property & Casualty Company, 437 Pa. Super. 108, 125, 649 A.2d 680, 688 (1994).

for denying a claim by showing that the insurer acted through some motive of self-interest or ill will.¹⁹

In the case *sub judice*, North River's claims representative denied coverage to CMX based on the professional services exclusion. Lexington claimed North River's application of the exclusion was unreasonable. Since this court already determined that the professional services exclusion applied, it was impossible based on said finding for Lexington to demonstrate that North River lacked a reasonable basis to deny coverage. Therefore, Lexington failed to prove bad faith, and summary judgment on Lexington's bad faith claims was appropriate.²⁰

CONCLUSION

For the foregoing reasons, this court's order dated September 6, 2012 granting North River's motions for summary judgment should be affirmed.

Date: January 3, 2013

BY THE COURT,


PÁTRICIA A. McINERNEY, J.

¹⁹ See Greene v. United Servs Auto Ass'n, 936 A.2d 1178, 1190-91 (Pa. Super. 2007); Bombar v. West Am Ins Co., 932 A.2d 78, 90 (Pa. Super. 2007).

²⁰ See, T.A. v. Allen, 868 A.2d 594 (Pa. Super. 2005), Cresswell v. Nat'l Mut. Cas. Ins. Co., 820 A.2d 172 (Pa. Super. 2003), Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742 (3d Cir. 1999).