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

1804-14 GREEN STREET ASSOCIATES, L.P.,	:	June Term 2006
Plaintiff,	:	No. 1763
v.	:	
ERIE INSURANCE EXCHANGE and ERIE INSURANCE GROUP,	:	Commerce Program
Defendants.	:	Control Numbers 021303/030292

ORDER

AND NOW, this 21st day of August 2008, upon consideration of the parties' cross motions for summary judgment, all responses in opposition, Memoranda, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED** that said motions are **Denied.**

BY THE COURT,

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HOWLAND W. ABRAMSON, J.

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ERIE INSURANCE EXCHANGE and ERIE INSURANCE GROUP,	:	Commerce Program
Defendants.	:	Control Number 021303

OPINION

This is an insurance dispute wherein the only issue to be decided is whether 1804-14 Green Street Associates' (hereinafter "Green Street") insurance claim is excluded under the insurance policy issued by Erie Insurance Group (hereinafter "Erie"). Green Street is the owner of property located at 240 New York Drive, Fort Washington, Pennsylvania. The property is a single story commercial building occupied by several tenants one of which was Fletcher-Harlee Corporation (hereinafter "Fletcher-Harlee"). Erie insured the property under an all-risk, "Ultrasure Policy".

On September 28, 2004, at approximately 6:00-6:30 p.m. David Fletcher, the President of Fletcher-Harlee, who was meeting with an employee, heard a loud bang from the center of the office building. Upon entering, Fletcher observed water gushing into the office which caused damage to the property. Green Street submitted a claim to Erie.

On December 6, 2004, Erie informed Green Street that the claim was denied because the damages relating to the loss were caused by a drain fastener rusting away. On June 16, 2006, Green Street filed the instant action against Erie. After discovery, the parties entered into a stipulation in which certain claims were dismissed and the parties

agreed to a confidential high/low. As part of the Stipulation, the parties agreed that the claim submitted by Green Street is covered under the Erie policy unless it falls within one or more exclusions under the Policy. The parties have now filed cross motions for summary judgment.

DISCUSSION

When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt."[1]

The insurance policy issued by Erie is an "all-risk" policy. Under an all-risk policy, "all losses are covered except for those specifically excluded."[2] In the case *sub judice*, Erie argues that Green Street's claim for coverage is excluded under various provisions of the policy. "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."[3] Where an insurer

[1] Swords v. Harleysville Insurance Companies, 584 Pa. 382, 883 A.2d 562, 566-567 (Pa. 2005).

[2] Spece v. Erie Ins. Group, 850 A.2d 679, 683 (Pa. Super. 2004).

[3] Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 106 (Pa. 1999).

relies on a policy exclusion as the basis for the denial of coverage, it has asserted an affirmative defense and the insurer must show the policy exclusion precludes coverage.[4] The insurer bears the burden of proof on that issue.

To determine whether Erie has met its burden of proof, the court relies on well-settled principles of contract interpretation. The task of interpreting an insurance contract is generally performed by a court rather than by a jury. The goal of that task is to ascertain the intent of the parties as manifested by the language of the written instrument. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.[5] Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. This is not a question to be resolved in a vacuum. Rather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts. The court will not distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity. [6]

The relevant policy provisions in this case are:

> SECTION III-EXCLUSIONS
>
> A. Coverages 1, 2 and 3
>
> We do not cover Building(s) (Coverage 1); Business Personal Property (Coverage 2); and Retal Income Protection (Coverage 3) “loss” or damage

[4] Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

[5] Gene & Harvey Builders v. Pennsylvania Mfrs. Ass'n, 517 A.2d 910, 913 (Pa. 1986).

[6] Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999).

> caused directly or indirectly by any of the following. *Such "loss" is excluded regardless of any cause or event that contributes concurrently or in any sequence to the "loss":*
>
> 1. Deterioration or depreciation.[7]

Erie asserts that the damage at issue is not covered by the Policy because it was caused by or resulted from the deterioration of a support bracket that held an interior roof drain in place. In response thereto, Green Street argues that the deterioration exclusion, now relied upon by Erie, does not apply since it was not cited to or relied upon by Erie when it informed Green Street of the reasons why its claim was being denied in 2004.[8] Green Street argues that allowing Erie to assert the deterioration exclusion at this time will deprive it of a reasonable attempt to investigate the applicability of the exclusion since the property was repaired, the roof replaced and the property sold.

Under Pennsylvania law, the doctrine of waiver or estoppel cannot create an insurance contract where none existed.[9] With respect to waiver, the Pennsylvania Supreme Court has stated: No party is required to name all his reasons at once … and the assignment of one reason for refusal to pay cannot be a waiver of any other existing reason, unless the other is one which could have been remedied or obviated, and the adversary was so far misled or lulled into security by silence as to such reason that to enforce it now would be unfair or unjust.[10]

In Wasilko v. Home Mut. Cas. Co., 210 Pa. Super. 322, 232 A.2d 60 (Pa. Super.

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[7] Erie Insurance Policy – p. 3 (emphasis added).

[8] Green Street's memo of law pg. 6.

[9] *See* Wasilko v. Home Mut. Cas. Co., 232 A.2d 60, 63 (Pa. Super. 1967) (*citing* Donovan v. New York Cas. Co., 94 A.2d 570 (Pa. 1953)).

[10] Slater v. General Cas. Co. of America, 344 Pa. 410, 25 A.2d 697, 699 (1942) (*quoted in* Pfeiffer v. Grocers Mutual Ins. Co., 379 A.2d 118 (Pa. Super. 1977)).

1967), the Superior Court explained, "the rule is well-established that conditions going to the coverage or scope of a policy of insurance, as distinguished from those furnishing a ground of forfeiture, may not be waived by implication from the conduct or action of the insurer."[11] Applying these principles here, Erie did not waive its right to deny coverage based on the deterioration exclusion. Although Erie did not specifically identify the deterioration exclusion as one of the reasons under which it denied coverage, the letter did contain a "catch-all" statement that Erie reserved its right to raise other issues or defenses that might affect coverage.[12] Hence, the deterioration exclusion was not waived.

Green Street's estoppel argument also fails. To make out a claim for estoppel, "there must be such conduct on the part of the insurer as would, if the insurer were not estopped, operate as a fraud on some party who has taken or neglected to take some action to his own prejudice in reliance thereon."[13] In the context of an insurer's failure to assert all possible defenses to coverage, plaintiffs must demonstrate "actual prejudice, that is, when the failure to assert all possible defenses causes the insured to act to his detriment in reliance thereon."[14] A party's reliance on an insured's conduct must be reasonable. Green Street bears the burden to establish each element of estoppel by "clear,

[11] 232 A.2d at 63.

[12] Erie's December 6, 2004 denial letter stated "We do not waive any of the other potentially applicable policy conditions or exclusions that may also apply to your loss. We do reserve any and all rights under the policy."

[13] Wasilko v. Home Mut. Cas. Co., 210 Pa. Super. 322, 232 A.2d 60.

[14] Mendel v. Home Ins. Co., 806 F. Supp. 1206, 1215 (E.D. Pa. 1992).

precise and unequivocal evidence."[15]

In analyzing whether Erie should be estopped from raising the deterioration exclusion, the relevant inquiry is whether Erie misled Green Street to such an extent that if Erie were not estopped, it would operate as a fraud on Green Street who took or neglected to take some action to its own prejudice in reliance on Erie's inconsistent statements, and that Green Street's detrimental reliance was reasonable.[16]

Here, Erie did expressly reserve its rights with respect to all other coverage defenses in its denial letter. Moreover, Erie asserted the exclusion as a defense in its New Matter. As such, Green Street had notice that Erie intended to assert the deterioration exclusion as a defense and therefore, the court cannot find that Green Street suffered any prejudice by Erie's failure to identify the deterioration exclusion as a basis for the denial of coverage.

Even though the deterioration exclusion may be relied upon by Erie as a basis for denial of coverage, issues of fact exist as to whether this exclusion bars Green Street's claim. Erie relies upon an expert report to prove deterioration, namely that the drain hub fasteners wasted away by oxidation and the drain pipe spontaneously moved out of alignment with the roof penetration and no longer was positioned to catch all the incoming water. Erie's expert report alone can not serve as the basis for summary judgment in its favor. Although the expert report is uncontradicted and unimpeached, the expert's qualifications and credibility are at issue. Assessment of qualifications and credibility are made at trial when the opposing party is given the opportunity to cross

[15] Chrysler Credit Corp. v. First Nat. Bank and Trust Co., 746 F.2d 200, 206 (3d Cir. 1984).

[16] Wasilko, 232 A.2d at 63.

examine the expert on his qualifications and opinions and the judge or the jury can then accept or deny the expert's opinion.

Moreover, the various estimates and invoices of spot repairs performed to repair roof leaks from 2002 through September 24, 2004, the date of loss, do not support the entry of summary judgment but rather creates issues of fact regarding the condition of the roof and drain pipes.

In addition to the deterioration exclusion, Erie also relies upon a "wear and tear" exclusion and a "rain" exclusion. Similar to the deterioration exclusion, summary judgment can not be granted since Erie again relies upon the uncontradicted and unimpeached expert opinion and a weather report to support application of the exclusions. Because the expert's qualifications and credibility are at issue and because the contents of the weather report create genuine issues of material fact, the parties' motions for summary judgment are denied.

CONCLUSION

For the foregoing reasons, the parties cross motions for summary judgments are denied.

BY THE COURT,

HOWLAND W. ABRAMSON, J.