

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PETTINARO CONSTRUCTION CO.,)
INC.,t/a The Pavilions at)
Bethany Bay, LINDER & CO, and)
MARYLAND CASUALTY INSURANCE)
CO.)
) Civil Action No. 99-683-SLR
Plaintiffs,)
)
v.)
)
UTICA MUTUAL INSURANCE CO.,)
)
Defendant.)

Daniel V. Folt, Esquire and David W. Carickhoff, Jr., Esquire of Cozen & O'Connor, Wilmington, Delaware. Counsel for plaintiffs. William F. Stewart, Esquire and Michael Hamilton, Esquire of Cozen & O'Connor, Philadelphia, Pennsylvania. Of counsel for plaintiffs.

John D. Balaguer, Esquire and Marc S. Casarino, Esquire of White and Williams, Wilmington, Delaware. Counsel for defendant.

MEMORANDUM OPINION

Dated: March 30, 2001
Wilmington, Delaware
ROBINSON, Chief Judge

I. INTRODUCTION

On November 24, 1997, a fire damaged a condominium building near Bethany Beach, Delaware. Presently, the construction company, the real estate developer, and two insurance companies ask the court to decide who should pay for the damages.

Plaintiff Pettinaro Construction Company, Inc. ("Pettinaro") is a Delaware corporation with its principal place of business in Newport, Delaware. (D.I. 1, ¶ 1) Plaintiff Linder & Company ("Linder") is a Delaware corporation with its principal place of business in Ocean View, Delaware. (D.I. 2, ¶2) Linder is a development company owned by many of the same principals involved in Pettinaro. (D.I. 35, tab B at 7-8) Linder retained Pettinaro to build a development of condominiums in Millville, Delaware, known as the Pavilions at Bethany Bay Condominiums ("Pavilions"). (D.I. 1, ¶ 7) Linder owned the Pavilions until November 20, 1997, at which time ownership was transferred to the "Association of Owners," pursuant to the Declaration For the Pavilions At Bethany Bay Condominiums. (D.I. 35, tab C) Pursuant to the Declaration, however, Linder retained the right to control the association until 95% of the units within the respective buildings were conveyed to individual unit-owners. (D.I. 35, tab C at 12)

Plaintiff Maryland Casualty Insurance Company ("Maryland Casualty") is a Maryland corporation with its principal place of business in Baltimore, Maryland. (D.I. 1, ¶ 3) Maryland

Casualty issued a builders risk insurance policy to Pettinaro effective December 4, 1996 through December 4, 1997. (D.I. 35, tab A)

Defendant Utica Mutual Insurance Company ("Utica Mutual") is a New York corporation with its principal place of business in New Hartford, New York. (D.I. 1, ¶4) Utica Mutual issued a condominium policy to the Association of Owners.¹

The November 24, 1997 fire caused \$563,886 in damage. (D.I. 34 at 1) Maryland Casualty paid \$522,564 to Pettinaro for the loss while Utica Mutual has declined coverage. Pettinaro seeks to recover from Utica Mutual \$56,783 in covered losses for which it has never been compensated, and Maryland Casualty seeks to recover the portion of the loss which allegedly constitutes Utica Mutual's legal and equitable share of coverage under applicable Delaware law.

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because there is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. Venue is proper in this court pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this action occurred in the District of Delaware.

¹The named insured on the policy is the Pavilions at Bethany Bay. (D.I. 39 at B-97) Verino Pettinaro, president of Linder, signed the application for the policy. (D.I. 39 at B-16; D.I. 34 at 2)

I. BACKGROUND

Linder is a real estate development company owned by Verino Pettinaro and four other Pettinaro family members. (D.I. 39 at B-69-70) Linder developed a resort condominium community in Bethany Beach, Delaware, and the Pavilions was the third phase of that community. Pettinaro began construction on the Pavilions on July 8, 1997, with Buildings B and D.

Two insurance policies were obtained for Buildings B and D. Pettinaro first secured a builders risk policy from Maryland Casualty that went into effect on December 4, 1996, and remained in effect through December 4, 1997. (D.I. 35, tab A) A condominium policy covering Buildings B and D was issued by Utica Mutual to the Pavilions sometime in November 1997 before the fire. The parties dispute which day the policy was to be bound,² but agree that the Utica Mutual policy was in effect on the date of the fire. (D.I. 1, ¶ 18; D.I. 5, ¶ 18)

From the papers submitted, the events leading to the securing of the Utica Mutual policy include the following: David Crowley, the project manager for sales and marketing of the Pavilions, contacted Jane McComrick of the McComrick Insurance Agency near the end of October 1997 to inquire about the purchase of a condominium policy covering the common elements of Buildings

²A temporary insurance binder was issued on November 18, 1997 and the actual policy was issued effective November 21, 1997. (D.I. 39 at B-19, B-97)

B and D. On November 17, 1997, McComrick faxed Linder's application to Linda Boulanger of the Lyons Insurance Agency. The Lyons Agency is an agent of Utica Mutual. Linder issued a check on November 19, 1997 for payment of the premium. (D.I. 39 at B-20)

On November 20, 1997, Crowley contacted McComrick and asked that Building D not be included on the policy because it was not yet completed.³ McComrick conveyed Crowley's request to the Lyons Agency. The Lyons Agency, however, insisted that Building D be left on the policy because it would be too much of an inconvenience to Utica Mutual to add it later. The parties dispute what each understood at that point. The Lyons Agency contends that it advised McComrick that Building D could not be removed from the Utica Mutual policy but that the coverage would not be effective until construction was completed. Crowley contends that he was never informed by McComrick or Lyons that there were any coverage restrictions.

On November 24, 1997, a fire destroyed much of Building D causing \$563,866 in damages. The cause of the fire has been linked to a construction-type propane heater being used by a drywall contractor to help dry the drywall plaster. According to an investigation conducted by the plaintiffs' counsel, a

³Plaintiffs contend that Crowley also contacted McComrick on November 18, 1997 and informed her that, while the structural and common elements of Building D were complete, additional work within the individual units was continuing.

Pettinaro employee placed construction-type propane heaters throughout four units in Building D. Despite the fact that the heaters have warnings against placing them on combustible flooring, the Pettinaro employee placed them on particle board flooring, which is combustible. The heater was left "on" overnight on the night of the fire. There are three possible causes for the fire. First, leaving the heater on a combustible surface unattended and "on" may have led to the fire. Second, the drywall contractors may have left combustibles too close to the heater, and those combustibles were ignited. Finally, it is possible that the heater itself malfunctioned. Because the heater and the building were heavily damaged by the fire, the exact cause is unknown. (D.I. 39 at B29-41)

After the fire, Linder put both Maryland Casualty and Utica Mutual on notice of the loss. Maryland Casualty agreed to pay the claim, and Utica Mutual declined coverage. Although the Maryland Casualty policy included \$800,000 in coverage, Pettinaro suffered a 7% co-insurance penalty because Maryland Casualty had determined that Building D required \$862,885 in coverage. Thus, Maryland Casualty paid approximately 93% of the claim or \$522,564.

Both parties agree that the language of the Utica Mutual policy governs the scope of coverage. The policy's "Descriptions of Premises Declarations" provides:

COVERAGE IS PROVIDED FOR TWO - THREE STORY

CONDOMINIUM BUILDINGS OF FRAME CONSTRUCTION
CONTAINING THIRTY-SIX RESIDENTIAL UNITS. THE
PREMISES IS LOCATED AT BUILDING D - CROWLEY
DRIVE, BUILDING B - ANDERSON DIVE, MILLVILLE,
SUSSEX COUNTY, DELAWARE 19970

(D.I. 39 at B-98)

The policy's "Property Coverage Part" states:

A. SPECIFIED PROPERTY ON THE PREMISES

Coverage is provided for the following
property on or within 1,000 feet of the
"premises" unless specifically stated
otherwise.

1. General Community Property Division

* * *

a. Buildings and Structures

Coverage is provided for:

(1) Buildings

Buildings that are
described in the
Declarations and **used in
whole or part** as:

residences, clubhouses,
meeting centers, boat
houses, garages, sewage
treatment facilities, and
buildings which house
heating and air
conditioning plants.

(2) Structures

Structures not described
in the Declarations and
used in whole as:

cabanas, courts for hand
ball, courts for racquet

sports, poolhouses,
gatehouses, storage
sheds, shelters,
mailboxes, gazebos, pump
houses, fences, walkways,
roadways, other paved
surfaces, recreation
fixtures, outdoor
fixtures, indoor and
outdoor "swimming pools,"
flagpoles, light poles,
fountains and outside
statues.

**Coverage is provided for
buildings and structures not
specified in (1) or (2) above
only when such other buildings
or structures are described in
the Declarations.**

(Emphasis added) Section III. B. of the policy, beginning on page 6, lists a number of exclusions to its property coverage. Specifically, paragraph III.B.2.d. provides:

2. We will not pay for loss or damage caused by the following:

* * *

d. Acts or Omissions

- (1) Acts, decisions, errors or omissions, including the failure to act or decide, of any person, group, organization, or governmental body.
- (2) Faulty, inadequate, defective or negligent:
 - (a) Planning, zoning, development, surveying, siting;

- (b) Design, testing, specifications, workmanship, repair, construction, renovation, remodeling, grading, earth compaction;
- (c) Materials used in repair, construction, renovation or remodeling; or
- (d) Maintenance

of part or all of any property on or off the described "premises."

III. STANDARD OF REVIEW

A court shall grant summary judgment only 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 that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party

then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion."

Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. The Legal Standards

The proper construction of any contract, including an insurance contract, is a question of law. Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co., 616 A.2d 1192, 1195 (Del. 1992). Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. Johnston v. Tally Ho, Inc., 303 A.2d 677, 679 (Del. Super. Ct. 1973).

Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 926 (Del. 1982). "When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." Id. To the extent that ambiguity does exist, the doctrine of contra proferentum requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it. Steigler v. Insurance Company of North America, 384 A.2d 398, 400 (Del. 1978).

A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Hallowell, 443 A.2d at 926. Ambiguity does not exist where the court can determine the meaning of a contract "without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends." Holland v. Hannan, 456 A.2d 807, 815 (D.C. 1983). Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. Zullo v. Smith, 427 A.2d 409, 412 (Conn. 1980).

The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. Steigler, 384 A.2d at 401 (contracts should be read to accord with the reasonable expectations of a reasonable purchaser).

B. Analysis

1. Does the Utica Mutual Policy Cover the Loss?

After reviewing the Utica Mutual policy, the court holds that the damages caused by the fire are covered by that policy. The Utica Mutual policy provides coverage for “[b]uildings that are described in the declarations and used in whole or in part as . . . residences.” The contract contains no vacancy provision and is not subject to an occupancy requirement. Linder paid a premium for condominium insurance, and the insurance became effective on November 18, 1997.⁴ Whether the building was still under construction makes no difference to the court’s conclusion that a building had been insured and that building was Building D.

Even if Building D does not fall within the general building provision, the Utica Mutual policy also provides coverage “for buildings and structures not specified . . . above only when such

⁴Defendants maintain the coverage became effective November 21. This factual dispute is irrelevant since the fire occurred on November 24, 1997.

other buildings or structures are described in the Declarations." Since Building D is specifically described in the Descriptions of Premises Declarations, it falls within the policy's coverage.

Defendants argue that since Building D was not being used as a residence, it does not constitute a "building . . . used in whole or part as a . . . residence." Defendants further argue that the Building D that burned was not the Building D in the Declaration because the Declaration describes a building "containing thirty-six residential units." The court disagrees. Where a premium has been paid and a building has been described, no reasonable construction of the policy language would conclude that nothing had been insured.

Defendant argues that even if Building D is covered under the Utica Mutual policy, the express exclusions found in paragraph III.B.2.d. apply. Defendant contends that one or more of the listed exclusions would apply regardless of whether the fire resulted specifically from the heater being on the plywood floor, or because combustibles were piled next to it, or because the heater was defective.

Plaintiffs argue that the faulty workmanship or construction exclusion has no application here. Plaintiffs contend that the faulty workmanship exception applies only to losses associated with the flawed quality of the work itself.

The court agrees with plaintiffs. In Allstate Ins. Co. v. Smith, 929 F.2d 447 (9th Cir. 1991), the Ninth Circuit reviewed similar exclusion provisions. The insured in that case purchased an "all risk" insurance policy from Allstate covering an office building. During the life of the policy, a roofing contractor was working on the building. During the day, the contractor removed most of the roof but did not put a temporary cover over the exposed premises. That night it rained and the insured's office equipment was damaged. Id. at 448-49.

The insurance policy in that case read:

3. We do not cover any loss or damage caused by any of the following. However, any ensuing loss not excluded or excepted in this policy is covered.

* * *

c. Faulty, inadequate or defective:

* * *

ii. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction . . .

Id. at 449. The Court of Appeals held that the faulty workmanship provision applied only to losses associated with the workmanship itself. Id. The court agrees with the reasoning of the Ninth Circuit. The exclusions in the Utica Mutual policy would preclude, for example, claims relating to cracks in drywall if the cause of the cracks were related to improper heating during construction. The exclusions in the

policy do not apply, however, to subsequent events caused by defective workmanship.

Because the court holds that the loss was covered by the policy, the court grants plaintiffs' motion for summary judgment and denies defendant's cross motion for summary judgment.

2. How Should the Loss be Apportioned?

Both the Maryland Casualty policy and the Utica Mutual policy contain an excess "other insurance" provision. An excess "other insurance" clause provides that the insurer's liability is limited to the amount of the loss exceeding all other valid and collectible insurance, up to the limits of the policy. See generally, Douglas R. Richmond, Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance, 22 Pepp. L. Rev. 1373 (1995).

Although the parties agree that each policy contains an excess "other insurance" clause, they disagree on how to apportion the damages. Two approaches have been adopted by courts in resolving how insurance proceeds should be allocated in light of two competing "other insurance" clauses. Under the majority rule, the total loss is prorated on the basis of the maximum coverage limits of each policy. Under the minority rule, policies share equally within the limits of the lower policy.

As far as the court can tell, Delaware courts have only addressed this issue once. In Liberty Mut. Ins. Co. v. Fireman's Fund Ins. Co., 479 A.2d 289 (Del. Super. Ct. 1983), then Judge Walsh used the minority rule to evenly apportion damages between two competing excess provisions. Although North Carolina law governed that dispute under the principle of lex loci contracti, the court applied general principles of insurance law. Id at 290. The court is persuaded by now Justice Walsh's reasoning and, therefore, holds that the parties should split the loss equally.

V. CONCLUSION

For the foregoing reasons, the court shall grant plaintiffs' motion for summary judgment and deny defendant's. The loss shall be apportioned equally. An appropriate order shall issue.

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FOR THE DISTRICT OF DELAWARE

PETTINARO CONSTRUCTION CO.,)
INC.,t/a The Pavilions at)
Bethany Bay, LINDER & CO, and)
MARYLAND CASUALTY INSURANCE)
CO.)
) Civil Action No. 99-683-SLR
Plaintiffs,)
)
v.)
)
UTICA MUTUAL INSURANCE CO.,)
)
Defendant.)
)

ORDER

At Wilmington this 30th day of March, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment (D.I. 33) is granted.
2. Defendant's cross motion for summary judgment (D.I. 38) is denied.
3. The loss shall be apportioned evenly.
4. The Clerk is directed to enter judgment in favor of plaintiffs and against defendant.

United States District Judge