IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3585

Summary Calendar

LAUREN PLAZA ASSOCIATES, LTD.,

Plaintiff,

v.

GORDON H. KOLB DEVELOPMENTS, INC.,

Defendant.

* *

MIKE McADAMS ROOFING CO., INC.,

Third-Party Plaintiff-Appellee,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY

Third-Party Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 91 0703 N)

(December 2, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Mike McAdams Roofing Company, Inc. (McAdams), filed a motion for summary judgment and/or a declaratory judgment against its insurer, United States Fidelity and Guaranty Company (USF&G), seeking contribution and/or indemnity and a determination by the district court that USF&G had a duty to defend it in litigation pending in the district court. The district court granted McAdams' motion for declaratory judgment concerning USF&G's duty to defend. USF&G appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Lauren Plaza Associates, Ltd. (LPA), owns the Lauren Plaza shopping center in Slidell, Louisiana. The shopping center was developed by Gordon H. Kolb Developments, Inc., in 1981. Clover Contractors was the general contractor for the shopping center; Clover Contractors is now involved in a Chapter 7 bankruptcy proceeding. McAdams performed roofing services for the project.

On February 15, 1991, LPA sued the developer and Linda and Gordon H. Kolb, individually, seeking damages for construction deficiencies in the shopping center. LPA later amended its complaint and added Fidelity & Deposit Company of Maryland (Fidelity), the surety for Clover Contractors, as a party to the suit. Fidelity then filed a third-party demand against McAdams based on alleged deficiencies in the roofing work done by McAdams.[1]

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[1] During Clover Contractors' bankruptcy proceedings, Clover Contractors abandoned and assigned to Fidelity "any claims, demands or causes of action which Clover has or may have against its subcontractors or suppliers that performed work or supplied materials in connection with the construction of the Lauren Plaza

USF&G had issued comprehensive general liability policies to McAdams covering the period from August 29, 1980 to November 1, 1987. After being served with the third-party demand, McAdams notified USF&G of the suit. After USF&G denied coverage to McAdams, McAdams filed a third-party demand against USF&G seeking contribution and/or indemnity for any amounts that McAdams might be liable to Fidelity and for USF&G to undertake McAdams' defense in the suit. McAdams then filed a motion for summary judgment and/or a declaratory judgment against USF&G which was denied by the district court. The district court determined that Fidelity was seeking damages for McAdams' faulty work on the roof and for damages caused by the faulty roof. However, the district court determined that USF&G did not have a duty to defend McAdams under the insurance policy because there had not been an "occurrence" as required by the policy.

McAdams then filed a motion to urge reconsideration of its motion for summary judgment and/or declaratory judgment. Because of the district court's earlier ruling, USF&G filed a motion for summary judgment seeking a final determination by the court that USF&G did not have a duty to defend or indemnify McAdams in the pending litigation. The district court determined that its earlier order was incorrect and that "occurrence" provisions and "work product" exclusions did not exclude from coverage consequential damages resulting from the improper performance of services. The district court then granted McAdams' motion for

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Shopping Center."

reconsideration and its motion for declaratory judgment concerning USF&G's duty to defend. The district court denied McAdams' and USF&G's motions for summary judgment. USF&G filed a motion to reconsider which the district court denied. The district court did, however, grant USF&G's motion to enter final judgment under Federal Rule of Civil Procedure 54(b). This appeal followed.

II. DISCUSSION

We review a district court's determination of state law de novo. Bituminous Casualty Corp. v. Vacuum Tanks, Inc., 975 F.2d 1130, 1132 (5th Cir. 1992). Under Louisiana law, an insurer's obligation to defend suits against its insured is broader then its liability for damage claims. Meloy v. Conoco, Inc., 504 So. 2d 833, 838 (La. 1987); American Home Assurance v. Czarniecki, 230 So. 2d 253, 259 (La. 1969). The insurer's duty to defend is determined by the allegations of the petition, and the insurer is obligated to defend the insured unless the petition unambiguously excludes coverage. Conoco, 504 So. 2d at 838; Czarniecki, 230 So. 2d at 259; Hallar Enters., Inc. v. Hartman, 583 So. 2d 883, 888 (La. Ct. App. 1991). Additionally, the allegations of the petition are liberally interpreted in determining whether they set forth grounds which bring the claim within the insurer's duty to defend. Czarniecki, 230 So. 2d at 259; see also Jensen v. Snellings, 841 F.2d 600, 612 (5th Cir. 1988). In Czarniecki, the Louisiana Supreme Court fashioned the following test to determine whether an insurer has a duty to defend its insured:

> Thus, if assuming all the allegations of the petition to be true, there would be both (1) coverage under the policy and (2) liability to the plaintiff, the insurer must defend the insured regardless of the outcome of the suit. Additionally, the allegations of the petition are liberally interpreted in determining whether they set forth grounds which bring the claims within the scope of the insurer's duty to defend the suit brought against its insured.

Czarniecki, 230 So. 2d at 259. Furthermore, once a complaint states one claim within the policy's coverage, the insurer has a duty to defend the entire lawsuit. Montgomery Elevator Co. v. Building Eng'g Servs., 730 F.2d 377, 382 (5th Cir. 1984). Therefore, we review the allegations against McAdams to determine if there is a possibility that any of those allegations will be covered by the insurance policy, thereby requiring USF&G to defend McAdams in the suit.

A. "Occurrence" Provision

Initially, USF&G argues that it has a duty to defend McAdams only if there is an "occurrence." USF&G argues that Fidelity's third-party demand against McAdams seeks damages only for the cost of repairing or replacing the roof. The relevant portions of the insurance policy provide that:

> [USF&G] will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence.

The policy defines the term "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured." The parties agree

that under Louisiana law an "occurrence" provision, such as the one involved in this case, excludes from coverage the cost of repairing or replacing the insured's own defective work product. Carpenter v. Lafayette Woodworks, Inc., 573 So. 2d 249, 251 (La. Ct. App. 1990); Fredeman Shipyard, Inc. v. Weldon Miller Contractors, Inc., 497 So. 2d 370, 374 (La. Ct. App. 1986). However, when the damage is to property other than the insured's work product, the "occurrence" provision of the policy does not foreclose the recovery of damages. See Bacon v. Diamond Motors, Inc., 424 So. 2d 1155, 1157 (La. Ct. App. 1982) (noting that damages to property other than that upon which the work was performed is an "occurrence"), writ denied, 429 So. 2d 131 (La. 1983). Therefore, if there are allegations against McAdams that its faulty work on the roof caused damage to other property, there would be an "occurrence" under the policy.

B. "Work Product" Exclusion

USF&G further argues that, even if Fidelity is alleging consequential damages to other property, the "work product" exclusion contained in its insurance policy with McAdams excludes consequential damages caused by the insured's work product. The district court determined that "work product" provisions do not exclude coverage when a party is seeking damages from the insured for damages to "other property" caused by the insured's defective work product. USF&G cites two cases in support of its contention, Allen v. Lawton and Moore Builders, 535 So. 2d 779

(La. Ct. App. 1988), and Old River Terminal v. Davco Corp., 431 So. 2d 1068 (La. Ct. App. 1983).

In Allen, the plaintiffs brought suit for damages for faulty construction of a home that they had purchased from the insured. 535 So. 2d at 780. The plaintiffs sought damages for the purchase price, interest on the purchase price, loss of appreciation, engineering fees, loss of enjoyment of the house, pain and suffering, reasonable attorney fees, and expert witness fees. Id. The defendant then filed a third-party demand seeking recovery of any amount it might be liable to the plaintiffs for. Id. The court concluded that the policy's "work product" exclusion provision precluded coverage under the policy. Id. at 782. The court stated that "[t]he damages claimed and relief sought by plaintiffs are all consequences of the alleged defective workmanship and defects in the work performed by the insured, for which the policy provides no coverage." Id. at 781. However, the court noted that the plaintiffs had not alleged that any damage was caused to any property other than the home. Id.

In Old River Terminal, the plaintiff had brought an action for damages resulting from the faulty construction of a grain storage facility. 431 So. 2d at 1070. The plaintiff also sought damages for "fees of consulting engineers and transportation expenses for the re-location of the soybeans." Id. The court determined that these damages were excluded from the coverage of the defendant's liability policy because of the policy's "work product" exclusion provision. Id. at 1071. The court reasoned

that these damages related to the defective construction of the silos and, therefore, were not covered. Id. However, once again, the plaintiffs did not allege that any damage was caused to any other property.

A case more on point is Gardner v. Lakvold, 521 So. 2d 818 (La. Ct. App. 1988). In Gardner, the court determined that a "work product" exclusion provision did not exclude coverage for damages to "other property." Id. at 820. The plaintiffs had hired Lakvold to remove paint from the outside of their home. Id. at 819. Lakvold failed to properly wash away the caustic chemicals he used to remove the paint. Id. Because of Lakvold's failure to properly wash away the chemicals, the new paint, which was applied by someone else, began to dissolve. Id. Lakvold's insurer denied coverage because the damage "to the exterior of the home arose out of the allegedly poor workmanship of Mr. Lakvold and the liability policy it issued to Mr. Lakvold specifically excluded coverage for property damage claimed for repair or replacement of work performed" by Lakvold. Id. at 820. The court, however, determined that the "work product" exclusion in the policy did not exclude coverage because the damage was not to work performed by the insured but to other property of the plaintiff, namely, the new paint. Additionally, the court stated that the Old River Terminal case was distinguishable because it did not concern damages to other property. Id.

Therefore, if there are allegations against McAdams that his faulty workmanship on the roof caused damages to other property,

that is, property other than the roof itself, the "work product" exclusion of the policy would not deny coverage.

C. "Sistership" Exclusion

USF&G also argues that the following exclusion excludes coverage for any claim of damage to other property:

> to damage claimed for the withdrawal, inspection, repair, replacement, or loss of use of the Named Insured's products or work completed by or for the Named Insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

This exclusion is known as a "sistership" exclusion. Todd Shipyards Corp. v. Turbine Serv., Inc., 674 F.2d 401, 419 (5th Cir.), cert. denied, 459 U.S. 1036, and cert. denied, 459 U.S. 1036 (1982); see also 15 WILLIAM MCKENZIE & H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE § 199 (1986). This exclusion "has been taken to mean simply that the insurer is not liable for cost of preventive or curative action taken by its insured in connection with the recall of products discovered to have a common fault." Champion v. Panel ERA Mfg. Co., 410 So. 2d 1230, 1238 (La. Ct. App.), writ denied, 414 So. 2d 389 (La. 1982). This case does not involve damages related to the recall of a product; therefore, the "sistership" exclusion is inapplicable to this case.

D. What damages are alleged

Additionally, USF&G argues that neither LPA's original demand nor Fidelity's third-party demand against McAdams seek "consequential damages" such as would be covered under the

policy. USF&G contends that LPA and Fidelity seek damages resulting solely from deficiencies in McAdams' defective work product. In its third-party demand, Fidelity alleges that:

XV.

> Lauren Plaza Associates, Inc. also complains of the following alleged deficiencies in the construction of Lauren Plaza:
>
> 1. Failure to install thermal extension joints in roof over TG&Y;
>
> 2. Roof leaks caused by improper construction and support; and
>
> 3. Failure to provide for thermal expansion of 300 foot long steel wide flange roof beams.

XVI.

> In connection with the Lauren Plaza project, Clover entered into a subcontract with Mike McAdams Roofing Company, Inc. for all or a portion of the roofing work complained of by Lauren Plaza Associates, Inc.

XVII.

> In the event Fidelity is found to have liability to plaintiffs, Lauren Plaza Associates, Inc., Fidelity, in its own right and as assignee of Clover, is entitled to full indemnification and/or contribution from Mike McAdams Roofing Company, Inc. for any damages or losses sustained by resulting from improper performance of McAdam's roofing subcontract with Clover, including without limitation, the alleged deficiencies identified in Paragraph XV above.

The district court determined that Fidelity's third-party demand did assert a claim for "consequential damages" to property other than the insured's work product. According to the district court:

> [i]n Paragraph XVII of the demand, Fidelity contends that it is entitled to "full indemnification and/or contribution from Mike McAdams Roofing Company, Inc. for any damages or losses sustained by [sic] resulting from improper performance of McAdam's [sic] roofing subcontract with Clover, including without limitation, the alleged deficiencies identified in Paragraph XV above." The alleged

> deficiencies listed in Paragraph XV include "roof leaks caused by improper construction and support." Reading the two paragraphs together, Fidelity seeks damages "resulting from" certain deficiencies, including "roof leaks."

USF&G further argues that, even if Fidelity's third-party demand seeks "consequential damages," the proper complaint to look to to determine the potential liability of McAdams in the suit is LPA's first amended complaint against Fidelity. USF&G contends that LPA is seeking damages only related to the defective workmanship performed on the shopping center and that, because Fidelity's liability to LPA is determined by LPA's complaint, McAdams' liability to Fidelity for indemnification and contribution is also determined by LPA's complaint.

However, an insurer owes a duty to defend its insured unless the claims made "against the insured are clearly excluded from coverage in the policy." Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203, 205 (5th Cir. 1991) (applying Louisiana law) (emphasis added). Louisiana law provides that the insurer's duty to defend its insured is very broad. See Jensen v. Snellings, 841 F.2d 600, 612 (5th Cir. 1988) (noting that under Louisiana law the insurer is obligated to defend the insured if the complaint discloses even a possibility of liability under the policy). Based on the insurer's broad duty to defend its insured, we hold that under Louisiana law an insured that has a third-party complaint filed against it, which alleges damages that are covered under its insurance policy, should be able to look to that complaint and require the insurer to defend him in the action. Our conclusion is supported by N.A. "Red" Mason v.

Stauffer Chem. Co., 461 So. 2d 589, 590-91 (La. Ct. App. 1984) (determining that the insurer had a duty to defend the insured when a third-party complaint alleged facts which would hold the insured liable under an indemnity agreement even though those facts contradicted the facts in the complaint filed against the third-party complainant and the facts alleged against the third-party complainant foreclosed coverage under the policy).

We conclude that the district court was correct in asserting that Fidelity's third-party complaint was the relevant complaint to look to in determining whether USF&G had a duty to defend McAdams. Viewing Fidelity's third-party demand against McAdams with the requisite liberality, we conclude that this demand against McAdams does disclose the possibility of liability under the policy because the demand may be seeking from McAdams damages to "other property," which is covered under the policy. Therefore, we conclude that USF&G has a duty to defend McAdams in the suit pending in the district court.

E. Prescription

Finally, USF&G argues that it does not have a duty to defend McAdams because any claim for "consequential damages" would have prescribed by the time that the original complaint was filed. In Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988) we addressed this same argument and determined that it was meritless. Id. at 614. Louisiana law looks to the allegations in the pleadings to determine if the insurer has a duty to defend. The insurance policy in question in this case provides that USF&G will defend

McAdams "even if any of the allegations of the suit are groundless, false or fraudulent." Fidelity's pleadings allege damages that are covered by the insurance policy between Fidelity and USF&G. Therefore, if the claims brought by Fidelity against McAdams are prescribed, USF&G must assert that defense on behalf of McAdams.

III.

For the foregoing reasons, we AFFIRM the district court's decision that USF&G does have a duty to defend McAdams in the suit pending in the district court.