IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-41017

AIU INSURANCE COMPANY,

Plaintiff-Appellee,

VERSUS

MALLAY CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(G-95-CV-485)

May 23, 1997

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Mallay Corporation ("Mallay") appeals a summary judgment in its insurance coverage dispute with AIU Insurance Company ("AIU"). Finding no error, we affirm.

I.

This declaratory judgment action arises from damages to a

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

turbine owned by Dow Chemical Company ("Dow") that were caused by Mallay during its repair of the turbine in February 1995. In the course of the repairs, the turbine dropped out of the jaws of a lathe and, as a result, incurred damages in excess of $91,000. Because the repairs occasioned by the damages delayed the return of the turbine to Dow, and because the turbine was an integral component of Dow's LHC-6 ethylene facility, Dow claimed an additional $2.9 million for the loss of use of its facility. Dow ultimately settled its claims against Mallay for $91,000 and released Mallay of any further liability stemming from the loss of use of the facility.

At the time of the accident, Mallay was insured by AIU under both property insurance and comprehensive general liability ("CGL") policies. Each was issued using the Texas Standard Form of insurance policy and was governed thereby. The property coverage policy contained a "liberalization clause" by which, if the State Board of Insurance prescribed the use of more liberal forms that would extend or broaden the insurance coverage without additional premium charge, such additional coverage would be applied to Mallay's benefit. One such "ISO" form was issued by the State Board in August 1994; both parties agree that this new form applies to the instant case.

Mallay sought coverage from AIU under the property and CGL policies for both the direct $91,000 in damages to the turbine and the additional $2.49 million in consequentials alleged by Dow. AIU

responded with a series of reservation-of-rights letters in which it alluded to the relevant policy exclusions it deemed dispositive of the coverage dispute. AIU subsequently denied all coverage, save for $2,500 from the liberalization clause, and filed the instant declaratory judgment action. Upon joint motions for summary judgment, the district court granted AIU's motion, awarding Mallay only the $2,500 liberalization clause payment.

II.

We review a grant of summary judgment *de novo*. *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "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 a judgment as a matter of law." FED. R. CIV. P. 56(c).

A.

Mallay contends that the district court erred in failing to find coverage under the extended coverage endorsement attached to the property coverage policy. The endorsement insures "against all risks of direct physical loss, except . . . V. Any property undergoing alterations, repairs, installation or servicing, including materials and supplies therefor, if directly attributable

to the operations or work being performed thereon." Mallay does not dispute that this provision arguably excludes its claims; it contends, instead, that the factual posture of the case precludes such.

According to Mallay, the act of dropping the turbine from the lather, which fall caused the damages, was not "directly attributable to the operations or work being performed thereon." Although it is true that Rod Edwards, the Mallay employee who was working on the turbine at the time of the accident, testified that he had burnished the area on one end of the turbine and was using the lathe to turn the turbine to the other end when it fell from the lathe, the turbine was still in the process of undergoing repairs, and the damages were directly attributable to the operations or work being performed thereon. Edwards was in fact manipulating the turbine to perform his work thereon, a sufficient nexus to trigger exclusion (V) under the endorsements.

B.

Mallay asserts that the district court should have found coverage under the comprehensive general liability policy. Mallay does not contend that the CGL policy provides coverage for the damages to the turbine (which damages are excluded plainly by the "care, custody, or control" provisions of paragraph 2.j.(4)), but rather that the policy covers the consequential damages to Dow's LHC-6 facility caused by the delays in returning the turbine to

Dow.

The CGL policy covers “property damage,” defined as “physical injury to tangible property” or “loss of use of tangible property that is not physically injured.” Excluded from the policy, however, is “property damage” (1) to “personal property in the care, custody or control of the insured” (Exclusion 2.j.(4)); (2) to “that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it” (Exclusion 2.j.(6)); and (3) “to property that has not been physically injured” and that arises out of “a defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work,' [except if] the loss or use . . . aris[es] out of sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use.” (Exclusion 2.m.(1)).

According to Mallay, the damage to the LHC-6 facility is a “loss of use of property that is not physically injured” and thus is covered “property damage.” Assuming *arguendo* that Mallay is correct, it also follows that coverage under the policy is not defeated by exclusions 2.j.(4)SSthe LHC-6 facility is not in the case, custody or control of MallaySSand 2.j.(6)SSMallay’s work was not performed incorrectly on the LHC-6 facility itself, but only on a constituent part thereof (the turbine).

Mallay’s coverage claim *is* defeated, however, under exclusion 2.m.(1). According to Mallay’s construction of the

definition of "property damage," the CGL policy does not cover "loss of use of tangible property [the LHC-6 facility] that is not physically injured" arising out of "a defect, deficiency, inadequacy or dangerous condition in . . . [Mallay's work on the turbine]" that did not arise out of "a sudden and accidental physical injury to [Mallay's work on the turbine] . . . after it has been put to its intended use." Because the loss of use of the LHC-6 facility did in fact arise out of some defect or inadequacy in Mallay's work on the turbine and, although possibly sudden and accidental, the damages to the turbine did not occur after it had been put to its intended use in the LHC-6 facility, the CGL policy does not provide coverage.

C.

Mallay contends that it is entitled to full coverage for the damages to the turbine and the facility based upon the liberalization clause and its incorporation of the 1994 ISO. AIU concedes that the ISO does in fact apply to the instant action, but disputes the amount of coverage that the ISO provides.

The ISO provides coverage for direct physical loss of or damage to "Covered Property" at Mallay's premises caused by or resulting from any "Covered Cause of Loss." "Covered Property" includes, among other things, personal property of others that is (1) in the care, custody, or control of Mallay; (2) located on the

Mallay premises; and (3) *for which a Limit of Insurance is shown in the Declarations*. It is this third requirement that is the source of disagreement.

AIU argues (and Mallay concedes) that the original policy's declarations do not contain a limit of insurance pertaining to the personal property of others specifically. In fact, under the terms of the original policy, property of others in Mallay's care, custody, or control was excluded from coverage (Exclusion 2.j.(4)). Mallay counters that, although there is no insurance limit for personal property of others, the declarations do show an insurance limit of $594,380 (later increased to $661,851) for "Contents," a term defined under the Texas Standard Property Policy to include, among other things, "stock," which in turn includes property held for repairs.

Even assuming *arguendo* that we may refer to the "Contents" declaration of coverage limits to satisfy the "personal property of others" coverage limit, the policy does not satisfy the limit-of-insurance requirement, as the Texas Standard Property Policy definition of "stock" was modified by the same ISO form under which Mallay claims the benefit under the Standard Policy liberalization clause. Under the new ISO definition, "stock" includes "merchandise held in storage for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping." Because the turbine is not within the classes of

property encompassed by the revised ISO “stock” definition, it is not among the “Contents” insured under the Texas Standard Policy for which the declarations contain a limit of insurance. Thus, the turbine is not “Covered Property” under the ISO.

D.

Thus, the only coverage to which Mallay is entitled is that which the district court determinedSSthe $2,500 coverage under § A.5.b.(2) of the 1994 ISO. According to the ISO, if the insured has a coinsurance percentage of 80% or more, it may extend the insurance that applies to cover, among other things, the personal property of others in its care, custody, or control. The coverage extension is capped, however, at $2,500. In the instant case, because Mallay has a coinsurance percentage of 80% on the policies issued by AIU, the liberalization clause of the Standard Policy extends the ISO coverage of $2,500 for Mallay’s custody of Dow’s turbine. All other coverage is excluded.

AFFIRMED.