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

COLONY INSURANCE COMPANY	:	**June Term, 2010**
	:	**No. 03934**
Plaintiff	:	
	:	
v.	:	
	:	
JOSEPH ROCCO & SONS d/b/a/ **HAYDEN CONSTRUCTION, CO.**	:	
	:	**Commerce Program**
and	:	
	:	
ALLSTATE INSURANCE COMPANY	:	
	:	
and	:	**Control No.**
	:	**10121426**
CERTAIN UNDERWRITERS AT LLOYD'S LONDON	:	
	:	
Defendants	:	

OPINION

The Motion for Summary Judgment requires this Court to determine whether Plaintiff, a provider of commercial general liability insurance policies, owes a duty to defend its insured, a construction company. For the reasons below, Plaintiff owes no duty to defend the insured.

Background

Plaintiff, Colony Insurance Company ("Colony" or "Plaintiff,") is a Virginia company licensed to issue insurance policies in Pennsylvania. Defendant, Hayden Construction, Co, ("Hayden,") is a construction company based in Philadelphia, Pennsylvania. At all times relevant to this action, Hayden was insured under a commercial liability policy issued by Colony. Anton Berzin ("Berzin,") a non-party

in this action, is an individual residing in Philadelphia, Pennsylvania. At all times relevant to this action, Berzin was engaged in the residential roofing business. Defendant Certain Underwriters at Lloyd's London ("Underwriters,") is licensed to underwrite insurance policies issued in Pennsylvania. At all times relevant this action, Underwriters provided insurance coverage to the business of Defendant Berzin. William and Nikkol Blagmon ("the Blagmons,") are non-parties in this action. At all times relevant to this action, the Blagmons owned real property in Philadelphia, Pennsylvania. Defendant Allstate is an insurance company licensed to issue insurance policies in Pennsylvania. At all times relevant to this action, Allstate insured the property owned by the Blagmons.

In 2008, the Blagmons entered into a contract with Hayden, whereby Hayden agreed to remove and rebuild the Blagmons' residential roof. Subsequently, Hayden hired Berzin to perform the work, and Berzin named Hayden as an additional insured under his policy.

By 4 July 2008, Berzin had removed a portion of the old roof and replaced it with a temporary tarpaulin cover. However, the tarpaulin failed to protect the home from rainwater: the rainwater flowed into the home, and caused damage in excess of $200,000 to the real and personal property of the Blagmons. The tarpaulin had been improperly installed. The Blagmons tendered claim of damages to their residential insurer, Allstate, and Allstate paid the claim. On 10 June 2009, Allstate, as a subrogee of the Blagmons, filed suit against Hayden (the "Underlying Action.") In the Underlying Action, Allstate asserts the claims of Negligence, Breach of Contract and Breach of Expressed or Implied Warranties

against Hayden and Berzin.[1]

Hayden, as an additional insured under the Berzin policy, tendered claim of defense and indemnification to Underwriters. On 25 August 2009, Underwriters issued a letter denying coverage to Hayden. On 17 September 2009, Underwriters instituted a Declaratory Judgment action asking the Court to rule that Underwriters owed no duty to defend and indemnify Hayden for the damage allegedly caused by Berzin's faulty workmanship.[2] At the close of discovery, Underwriters filed a motion for summary judgment. The motion argued that faulty installation of a temporary tarpaulin did not constitute a covered occurrence under the policy, and any damage stemming therefrom is not covered. Underwriters concluded that damage caused by the improperly installed tarpaulin was not covered under its policy. On 19 May 2009, the Trial Court granted the motion filed by Underwriters, ruled that Underwriters had no duty to defend Hayden, and issued a simultaneous Opinion consistent with its Order. The Opinion stated:

> The [Underwriters'] Policy provides coverage for an "occurrence," which is defined as an "accident," including continuous or repeated exposure to substantially the same general harmful conditions. The Pennsylvania Superior Court has ... held that the interior water damage resulting from a contractor's faulty workmanship was not an "accident" or an "occurrence" under a commercial general liability policy, such as the policy here. The [Pennsylvania Superior Court] found that the terms "occurrence" and "accident" in the

[1] Allstate Insurance Company v. Hayden Construction Co and Anton Berzin, Court of Common Pleas of Philadelphia County, Trial Division, Civil, Case No. 0906-1363.
[2] Certain Underwriters at Lloyd's London v. Berzin, Allstate Insurance, Hayden Construction Company and Colony Insurance, Court of Common Pleas, Philadelphia County, Trial Division, Civil, No. 0909-01263.

> commercial general liability policy ... contemplated a degree of fortuity and does not accompany faulty workmanship.... Natural and foreseeable acts, such as rainfall, which tend to exacerbate the damage, effect or consequences caused *ab initio* by faulty workmanship also cannot be considered sufficiently fortuitous to constitute an "occurrence" or "accident" for purposes of an occurrence based on commercial general liability policy.... To reiterate, damage caused by rainfall that seeps through faulty home exterior work to damage the interior of a home is not a fortuitous event that would trigger coverage.[3]

Hayden tendered claim for defense and indemnification not only as an additional insured of Berzin, but also as the primary insured under Colony's commercial general liability policy.[4] Colony has agreed to represent Hayden in the Underlying action under a reservation of rights. However, on 2 July 2010, Colony filed the instant Declaratory Judgment Action against Hayden, Allstate and Underwriters (the "Instant Action"). In the complaint, Colony avers that the operative facts in the Instant Action are the same as those alleged by Underwriters in the prior Declaratory Judgment Action. On 19 October 2010, Hayden filed its Answer to the Complaint in the Instant Action. In the Answer, Hayden denies all conclusions of law contained in the Complaint, but admits all operative facts averred therein.[5]

On 10 December 2010, Colony filed a Motion for Summary Judgment. In the motion, Colony re-asserts that the operative facts alleged in its complaint are the same as those litigated in the prior Declaratory Judgment Action filed by

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[3] Certain Underwriters at Lloyd's London v, Anton Berzin, Allstate Insurance Company, *et al.*, Opinion dated 19 May 2010, issued by the Honorable Judge Mark I. Bernstein, Case No. 0909-01263, Motion Control No. 10121426, *aff'd* No. 1728 EDA (Pa. Super. 2010).
[4] Policy No. GL3028653, Exhibit E to the Motion for Summary Judgment of Plaintiff Colony.
[5] Answer to Declaratory Judgment Complaint.

Underwriters. In that action, Underwriters owed no duty to defend and indemnify Hayden because the damage caused by Berzin's faulty workmanship did not amount to an "occurrence" and was not an "accident" as defined under the policy issued by Underwriters. Colony notes that its insurance policy defines "occurrence" and "accident" consistently with the definitions in the policy issued by Underwriters. Colony concludes that it owes no duty to defend and indemnify Hayden in the Underlying Action.[6] Colony's policy states in relevant part:

> Section I—COVERAGES
>
> COVERAGE A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the Insured [Hayden] becomes legally obligated to pay as damages because of ... "property damage" to which this insurance applies.... However, we have no duty to defend the insured against any "suit" seeking damages for ... "property damage" to which this insurance does not apply.
>
> * * *
>
> b. This insurance applies to ... "property damage" only if:
>
> (1) The ... "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> (2) The ... "property damage" occurs during the policy period....
>
> * * *
>
> Section V—DEFINITIONS
>
> * * *
>
> 13 "Occurrence" means an accident, including continuous and repeated exposure to substantially the same general harmful conditions.[7]

[6] Motion for Summary Judgment of Plaintiff Colony, pp. 6-7.
[7] Policy No. CGL3028653, Exhibit E to the Motion for Summary Judgment of Plaintiff Colony.

On 10 January 2011, Defendant Hayden filed a "Response to the Motion for Summary Judgment with Request to Stay Proceedings." The response of Defendant Hayden does not address the merits of Colony's motion and does not deny the numbered paragraphs thereof. Instead, the Response filed by Hayden asserts the following:

> 5. Mr. Joseph Rocco is an officer of Hayden Construction.
>
> 6. Ms. Joyce Rocco [wife of Joseph] is the President and corporate designee of Hayden Construction.
>
> 7. Since the filing of [Colony's] Motion for Summary Judgment, Hayden Construction's counsel has learned that Mr. Rocco is ... currently suffering from cirrhosis of the liver....
>
> 8. One of the complications associated with cirrhosis of the liver ... is encephalopathy. Encephalopathy occurs when the liver loses its ability to detoxify, allowing toxins to enter the bloodstream and impair brain function. This is exhibited by confusion, disorientation and other mental changes.
>
> * * *
>
> 10. Mr Rocco started a treatment program at the Mayo Clinic in Jacksonville, Fl., on November 8, 2010. This ... treatment requires that Mr. Rocco stay near the clinic until a transplant becomes available....
>
> 11. Additionally, Ms. Rocco has been caused to fly down to the Mayo Clinic ... to render assistance ... with his treatment and rehabilitation....
>
> * * *
>
> 14. Mr. Rocco and Ms. Rocco are the only people ... [who] have knowledge of the transaction and incident from which this suit arises.
>
> * * *

> WHEREFORE, Hayden Construction respectfully requests that this Honorable Court grant its motion to Stay ... until such time a meaningful response may be rendered, and enter an Order ... staying all proceedings for one (1) year and extending all case deadlines accordingly.[8]

Discussion

> The [Pennsylvania Rules of Civil Procedure] instruct ... that the 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.... Under the Rules, a motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law.... For purposes of summary judgment, the record includes any pleadings, interrogatory answers, depositions, admissions, and affidavits.... 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 where the right to such a judgment is clear and free from doubt.[9]

I. There is no controverted question of material fact.

Under the Pennsylvania Rules of Civil Procedure,

> The adverse party [to a motion for summary judgment] may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying ... one or more issues of fact arising from evidence in the record

[8] Defendant Hayden's Response to the Motion for Summary Judgment with Request to Stay Proceedings.
[9] Scalice v. Pa. Emples. Benefit Trust Fund, 883 A.2d 429, 435 (Pa. 2005) (explaining Pa. R.C.P. 1035.1, 1035.2).

> controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion.[10]
>
> If the non-moving party does not respond, the trial court may grant summary judgment on that basis .... Because ... the non-moving party must respond to a motion for summary judgment, he or she bears the same responsibility as in any proceeding, to raise all defenses or grounds for relief at the first opportunity. A party who fails to raise such defenses or grounds for relief may not assert that the trial court erred in failing to address them.[11]

In this case, the Motion for Summary Judgment asserts that the operative facts in the Instant Action are the same as those litigated in the prior Declaratory Judgment Action filed by Underwriters. Defendant filed a response to Colony's motion. That response is captioned "Response to Motion for Summary Judgment with Request to Stay Proceedings." Defendant's Response does not deny or address any of the issues of fact from the evidence of record, but merely asserts new matter not found on the record. Nevertheless, Defendant did admit all operative facts asserted in the instant Declaratory Judgment Complaint when Defendant filed its Answer on 19 October 2010. There is no disputed issue of material fact because Defendant admitted all operative facts asserted in the Declaratory Judgment Complaint.

II. **Defendant Hayden is collaterally estopped from re-litigating the identical issues decided in the prior Declaratory Judgment Action filed by Underwriters**.

> Collateral estoppel, also referred to as issue preclusion, operates to prevent a question

[10] Henninger v. State Farm Ins. Co., 719 A.2d 1074, 1076 (Pa. Super. 1998) (explaining Pa. R.C.P 1035.2, 1035.3 (a)(1)).
[11] Walsh v. Borczon, 881 A.2d 1, 5 (Pa. Super. 2005) (discussing Pa. R.C.P. 1035.3(d)).

> of law or issue of fact which has once been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit.... It applies where—
>
> (1) the issue decided in the prior case is identical to one presented in the later case;
> (2) there was a final judgment on the merits;
> (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
> (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and
> (5) the determination in the prior proceeding was essential to the judgment.[12]

In the prior Declaratory Judgment Action filed by Underwriters, the issue was whether damage caused by rainfall, which had poured into the Blagmons' home through an improperly installed tarpaulin, amounted to an occurrence triggering coverage under a commercial liability policy. In this case, the facts and the issues are identical to those litigated in the prior Declaratory Judgment Action: Hayden was a party in the prior litigation, had a full and fair opportunity to litigate the case in the prior action, and is Defendant in the Instant Action. In addition, the determination of the prior proceeding was essential to the judgment, and the judgment was final on the merits. Hayden is collaterally estopped from re-litigating an identical case before this Court.

IV. **Defendant Hayden has failed to meet its burden of proof for a Stay**.

[12] Spisak v. Edelstein, 768 A.2d 874, 876-877 (Pa. Super. 2001).

In Pennsylvania,

> the grant of a stay is warranted if:
>
> 1. The petitioner makes a strong showing that he is likely to prevail on the merits.
> 2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
> 3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
> 4. The issuance of a stay will not adversely affect the public interest.[13]

In this case, Hayden states that an officer of Hayden is critically ill and in need of a liver transplant. His wife, president of Hayden, must stay by his bedside throughout the illness. Hayden requests the stay because husband and wife are the only individuals with knowledge of the facts involved in the Instant Action. However, Hayden is collaterally estopped from re-litigating the issue in the Instant Action, and cannot show that it would likely prevail. In addition, Hayden cannot show irreparable injury because the issue in the Instant Action has already been determined in the prior Declaratory Judgment Action. Hayden has failed to meet the burden of proof necessary to obtain a stay, and the Motion for Summary Judgment of Plaintiff Colony Insurance Company is granted.

The Court shall issue a simultaneous Order consistent with this Opinion.

By The Court,

_____
Arnold L. New, J.

Dated: May 6, 2011

[13] Pa. Public Util. Com v. Process Gas Consumers Group, 467 A.2d 805, 808 (Pa. 1983).