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

GOLDSTEINS ROSENBERGS-RAPHEL SACKS, INC.,	:	May Term 2004
Plaintiff,	:	No. 1203
v.	:	
ERIE INSURANCE EXCHANGE,	:	COMMERCE PROGRAM
Defendant.	:	
	:	Control Number 012678

ORDER and OPINION

AND NOW, this 27th day of May, 2005, upon consideration of the Motion for Summary Judgment of Defendant Erie Insurance Exchange, Plaintiff's response in opposition, Memorandum, all matters of record and in accord with the contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that Defendant's Motion for Summary Judgment is **Granted** and Plaintiff's Complaint is Dismissed.

BY THE COURT,

_____
C. DARNELL JONES, II, J.

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OPINION

JONES, II, J.

In this action the court is called upon to interpret an exclusion clause in an "all risk" policy of insurance to determine whether coverage exists for damage suffered as a result of water infiltration from a particular roof on the insured property. Presently before the court is the Motion for Summary Judgment filed by Defendant Erie Insurance Exchange ("Erie" or "Defendant"). For the reasons discussed below, Defendant's Motion for Summary Judgment is Granted.

BACKGROUND

Plaintiff, Goldsteins', Rosenberg's –Raphael Sacks, Inc. ("Plaintiff") is a corporation that operates two funeral homes, one at 6400 North Broad Street and the other at 310 Second Street Pike in Southampton, Pennsylvania. The property at issue is the Southampton location. Erie insured the property at issue pursuant to an Ultrapack insurance policy bearing policy number Q48 1790121 A with effective dates of December 17, 2001 through December 17, 2002.

The building in question has a series of roofs including a flat roof covering the majority of the structure, a canopy roof and a sloped roof covering the chapel. The subject of this action is the sloped chapel roof.

In February 2002, Rosenblatt Roofing gave an estimate to replace the flat roof since Plaintiff was experiencing a series of problems with regard to the flat roof. The flat roof was repaired by Rosenblatt Roofing per the estimate provided in February, 2002. Thereafter Rosenblatt Roofing returned to the property pursuant to a call placed by the insureds to repair the chapel roof which began leaking. The Estimator for Rosenblatt Roofing, Stephen Meller testified that upon inspection of the chapel roof he discovered a whole the size of a quarter on the chapel roof and repaired it with roofing cement.

Between September 26, 2002 and 28th, 2002[1], a rain storm dropped over two inches of rain in a forty-eight hour period. The rain and wind infiltrated the chapel roof resulting in interior damage to the chapel and contiguous areas. Plaintiff alleges it suffered damages of approximately $113,009.83 to the building.

Plaintiff hired Young Adjustment Company ("Young") to assist it with the loss. Young notified Erie of the claim in the beginning of October 2002. Approximately one year after the loss, Erie retained National Forensic Consultants to inspect the roof to determine the cause and origin of the water leak. National Forensic Consultants concluded that "the damage was caused by a defect in the old roofing system that developed over the many years of life of the roof" and denied the claim.

[1] In the complaint, Plaintiff alleges that the loss occurred on October 3, 2002. In Plaintiff's response to Defendant's Motion for Summary Judgment, Plaintiff alleges the loss occurred on September 26 to September 28, 2002.

Thereafter, Plaintiff instituted this breach of contract action against Erie, contending that the damage sustained was covered under the policy of insurance. Erie has now filed a motion for summary judgment.

DISCUSSION

I. Standard of Review

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc. v. Cohen, 2002 Phila. Ct. Com. Pl. Lexis 54,* 2 (Pa. Com. Pl. 2002) (Herron, J.). Under Pa. R.C. P. 1035.2(2), a defendant may make the showing necessary to support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. In response, the nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

II. Plaintiff's Loss Does Not Constitute an "Occurrence" Under the Policy of Insurance.

Erie argues that summary judgment is appropriate as Plaintiff has failed to show that the claimed loss is a covered loss under the terms of the policy. Specifically, Erie argues that the facts alleged in the complaint and discovery fail to identify what caused the openings in the roofs that permitted the rain water to enter the building. Plaintiff on the other hand argues that the covered loss is the heavy rain and wind which caused the

water to infiltrate the upper sloped roof/chapel roof and enter the interior of the chapel and surrounding areas.

The first step in the court's analysis is to determine whether the heavy rain and wind constitutes a covered loss under the terms of the policy. Interpretation of an insurance contract is a matter of law and is therefore generally performed by a court rather than by a jury. In interpreting the language of a policy, the goal is to ascertain the intent of the parties as manifested by the language of the written instrument. Indeed, our Supreme Court has instructed that the polestar of our inquiry is the language of the insurance policy. Egger v. Gulf Ins. Co., 864 A.2d 1234 (Pa. Super. 2004)(*citing* Wagner v. Erie Ins. Co., 801 A.2d 1226, 1230-31 (Pa. Super. 2002)).

Where the language of the insurance contract is clear and unambiguous, a court is required to give effect to that language. When construing a policy, words of common usage are to be construed in their natural, plain and ordinary sense and we may inform our understanding of these terms by considering their dictionary definitions. Id.

While a court must not distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity, it must find that the contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts. 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. Id.

The insurance policy at issue in this litigation is an "all risk" policy. [2] In an action based upon an "all risk" policy, the burden is upon the insured to show that a loss has

[2] An "all-risk" insurance policy extends coverage to risks not generally covered under other insurance policies. Cavalier Group v. Strescon Industries, Inc., 782 F. Supp. 946, 954 (D. Del. 1992). Such policies

occurred; thereafter the burden is on the insurer to defend by showing that the loss falls within a specific policy exclusion. Wexler Knitting Mills v. Atlantic Mut. Ins. Co., 555 A.2d 903, 905 (Pa. Super. 1989)(*citing* Miller v. Boston Ins. Co., 218 A.2d 275 (Pa. 1966)).

The Policy at issue defines "occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to the same general, harmful conditions.
> (Defendant's Motion for Summary Judgment Exhibit "J", p. 7)

According to Erie's policy, it does not cover loss caused:

> 4. …to the interior of the building or the contents by rain, snow, sand or dust, whether driven by wind or not, unless the exterior of the building first sustains damage to its roof or walls by a covered **loss.** We will pay for the **loss** caused by or resulting from thawing of snow, sleet or ice on the building.
> Exhibit "J" p. 12, ¶ (B) (4)(emphasis added).[3]

Thus, in order for Plaintiff to recover for the damage caused to the interior of the building it must first demonstrate that the roof was damaged by a covered loss. The plain and unambiguous terms of the policy provide as follows:

> WHAT WE DO NOT COVER-EXCLUSIONS
>
> A. Coverages A, B and C
>
> We do not cover under Building(s) (Coverage A); Business Personal Property and Personal Property of Others (Coverage B); and Income Protection (Coverage C) loss caused directly or indirectly regardless of any cause or event contributing concurrently or in any sequence to the loss"
>
> 5. by deterioration or depreciation.

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generally permit recovery for all fortuitous losses in the absence of fraud or misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage. Id.; Bd. of Educ. v. International Ins. Co., 292 Ill. App. 3d 14, 684 N.E.2d 978, 981, 225 Ill. Dec. 987 (Ill. App. 1 Dist. 1997), appeal denied, 175 Ill. 2d 523, 689 N.E.2d 1137, 228 Ill. Dec. 716; 13A George J. Couch, Couch on Insurance § 48:141 at 139 (M.S. Rhodes ed. 1982); 43 Am. Jur.2d, Insurance § 505; Annotation, Coverage Under All-Risk Insurance, 30 A.L.R.5th 170 (1995).

[3] Loss is defined by the policy as direct and accidental loss of or damage to insured property. Exhibit "J" P. 6.

…

10. by weather conditions, but only if weather conditions contribute in any way with a peril excluded in Part A. to produce the loss.

…

12. by faulty, inadequate, or defective
    a. planning, zoning, development;
    b. design, development of specifications, workmanship, construction;
    c. material used in construction;
    d. maintenance;

    of property whether on or off the insured premises by anyone. (Exhibit "J" p. 12).

Erie's policy specifically states that a loss caused by weather conditions which contribute in any way with a peril excluded in Part A of the policy does not constitute a covered loss. As set forth above, Part A of the policy excludes as a peril defective design. The record evidence demonstrates that heavy rain and wind as well as the defective design of the roof concurrently contributed to Plaintiff's loss.

When an insurer such as Erie relies on a policy exclusion as the basis for its denial of coverage, it has asserted an affirmative defense and thus bears the burden of proving such a defense. Fayette County Hous. Auth. v. Hous. & Redevelopment Ins., 771 A.2d 11, 13 (Pa. Super. 2001) (*citing* Madison Construction co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999)). The court finds that Erie has met its burden of proving that its policy excludes coverage for the damage sustained to the interior of plaintiff's property.

The report prepared by the National Forensic Consultants, Defendant's expert, concluded that the damage to the chapel roof was caused by a defect in the old roofing system that had developed over the many years of the life of the roof and was exposed by the heavy rain event. Specifically, the investigator made three specific findings: (1) the drain related to the area of damage in the chapel was clogged by the roof ballast, either

completely or partially, causing the heavy rain to build up behind the parapet, (2) the scupper which was to relieve the buildup of water behind the parapet, was placed relatively high above the drain, causing a puddle six to ten inches to build up behind the parapet, and (3) the buildup of water behind the parapet caused the water to move uphill against the direction the roof was laid and causing the water to infiltrate the interior of the building. (Defendant's Motion for Summary Judgment Exhibit "A").[4] In reaching this conclusion, the original drawings of the original construction and inspected the chapel roof.

Plaintiff has not presented any evidence to rebut the claim that the chapel roof was defective.[5] As such Plaintiff has failed to come forward with sufficient evidence to create a genuine issue of material fact as to whether the chapel roof was defective.
A proper grant of summary judgment depends upon the evidentiary record that either shows the material facts are undisputed or contains insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the jury. Behringer Saws, Inc. v. Travelers Indem.Co. of Illinois, 2003 WL 21962949, *2 (Pa. Com. Pl. June 30, 2003)(McCarthy v. Dan Lepore & Sons Co., Inc., 724 A.2d 938 (Pa. Super. 1998). If the non moving party fails to come forward with sufficient evidence to establish or contest a material issue to the case, the moving party is entitled to judgment as a matter of law. Universal Teleservices Ariz, LLC v. Zurich American Ins. Co., 2004 Phila. Ct. Com. Pl. Lexis 88 (Phila. Com. P. Lexis, 2004).

Here Plaintiff has failed to come forward with sufficient evidence to establish a

[4] The fact that National Forensic Consultants, Inc. inspected the property one year after the loss does not affect the court's decision in this matter.
[5] Instead Plaintiff only presented evidence to create a genuine issue of material fact regarding whether the loss was caused by wear and tear of the chapel roof.

material issue of fact as it pertains to the design defect exclusion. Defective "is defined as "an imperfection or shortcoming, esp. in a part that is essential to the operation or safety of a product." Black's Law Dictionary 429 (7th ed. 1999)(*see*, GTE Corp. v. Allendale Mut. Ins. Co., 372 F. 3d 598, 610 (3d Cir. 2004)). Here there was an "imperfection or shortcoming" in the chapel roof--the inability of the chapel roof to properly route the water during the rain storm of September 26, 2002 and September 28, 2002.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is Granted and Plaintiff's Complaint is Dismissed.[6] An Order consistent with this Opinion will follow.

BY THE COURT,

_____

C. DARNELL JONES, II, J.

[6] The court need not address Defendant's other grounds for summary judgment since it has determined that Plaintiff's loss is an excluded peril under the policy.