23-P-346 Appeals Court

LAWRENCE H. LESSARD & another[1] vs. R.C. HAVENS & SONS, INC., & others.[2]

No. 23-P-346.

Essex. April 8, 2024. – August 14, 2024.

Present: Massing, Shin, & D'Angelo, JJ.

Insurance, Property damage, General liability insurance. Damages, Defective construction. Indemnity. Contract, Indemnity, Construction of contract. Practice, Civil, Summary judgment. Declaratory Relief.

Civil action commenced in the Superior Court Department on April 26, 2012.

A complaint for declaratory relief, filed on September 21, 2015, was heard by Kristen Buxton, J., on motions for summary judgment.

Nina E. Kallen for the plaintiffs.
Michael S. Melville for the intervener.

[1] Jennifer A. Meshna.

[2] Timothy D. Havens; and Main Street America Assurance Company, intervener.

SHIN, J. This appeal requires us to decide whether the costs of repairing or removing construction defects constitute "damages because of . . . 'property damage'" within the meaning of a commercial general liability policy. In the underlying action, Lawrence H. Lessard and Jennifer A. Meshna (together, the homeowners) brought a complaint for damages resulting from the faulty construction of their home against R.C. Havens & Sons, Inc. (R.C. Havens), and Timothy D. Havens (together, the Havens defendants). At a trial on the Havens defendants' liability, a jury found numerous construction defects and awarded the homeowners $272,533 in damages. Meanwhile, Main Street America Assurance Company (MSA) -- the insurer that issued to R.C. Havens the commercial general liability policy covering the relevant period -- intervened in the action and sought a declaration that it did not have a duty to indemnify R.C. Havens under the policy. Following the trial and entry of a final judgment establishing the Havens defendants' liability (final judgment), the homeowners and MSA cross-moved for summary judgment on MSA's duty to indemnify R.C. Havens. On those cross motions, a declaratory judgment entered for MSA, and the homeowners appealed.[3] Because we hold that construction defects,

[3] The motion judge ruled in favor of MSA on the homeowners' reach and apply counterclaim and their counterclaim for unfair and deceptive insurance practices. While no separate judgment

standing alone, do not constitute property damage within the meaning of a commercial general liability policy, we affirm the declaratory judgment.

Background. Given the jury verdict establishing the Havens defendants' liability, the following facts are not in dispute.[4] The homeowners entered into a contract with R.C. Havens whereby R.C. Havens agreed to serve as the general contractor for the construction of a single-family home in Marblehead. The president of R.C. Havens, Timothy Havens, served as the construction supervisor on the project.

As the project neared completion, the homeowners began to discover substantial issues with the quality of the construction. A number of problems compromised the structural integrity of the home. A portion of a structural post that was supposed to run from the roof to the basement was missing, and partition walls, sill plates, and support beams were installed incorrectly.[5] As a result, some partition walls were improperly weight bearing. According to the homeowners' structural

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entered as to the counterclaims, we treat them as subsumed within the declaratory judgment.

[4] The Havens defendants did not file a notice of appeal from the judgment of liability against them.

[5] The parties dispute whether R.C. Havens or a subcontractor was responsible for many of the construction defects that we discuss. This dispute is immaterial to our analysis.

engineer, fixing the structural problems would require extensive work, including installing the missing post, doubling up the floor joists under the partition walls, and jacking up the floors. Separate from these structural faults, counter flashing was not installed on the posts of a roof deck; the home's siding was not fastened correctly; and there were numerous problems with the installation of the home's metal roof. The roof deck, siding, and metal roof all had to be replaced to fix the construction defects.

The jury awarded the homeowners $114,159 for the structural defects, $14,207 for the roof deck, $37,000 for the siding, and $52,500 for the metal roof. The jury also awarded the homeowners $925 for problems with the home's insulation, $18,036 for mold damage, $8,430 for loss of use of their home during repair work, and $27,276 for costs of investigating the defects.

As noted, following the trial on the Havens defendants' liability, the homeowners and MSA cross-moved for summary judgment on whether MSA had a duty to indemnify R.C. Havens. The motions raised numerous issues, including whether the homeowners' losses were covered under the policy as "property damage" caused by an "occurrence" and whether various exclusions applied. A Superior Court judge ruled for MSA on all the issues. A declaratory judgment entered accordingly for MSA, and the homeowners appealed.

Discussion. The issues in this appeal are "well-suited for summary judgment, since the interpretation of an insurance contract is a question of law for the court" (quotation and citation omitted). Cable Mills, LLC v. Coakley Pierpan Dolan & Collins Ins. Agency, Inc., 82 Mass. App. Ct. 415, 418 (2012). We review the interpretation of the policy, and the corresponding grant of summary judgment for MSA, de novo. See Vermont Mut. Ins. Co. v. Poirier, 490 Mass. 161, 164 (2022); Norfolk & Dedham Mut. Fire Ins. Co. v. Norton, 100 Mass. App. Ct. 476, 478 (2021). "Our objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose" (quotations and citation omitted). Norfolk & Dedham Mut. Fire Ins. Co., supra. As a general principle, the insured (or the individual seeking coverage) "bears the initial burden of proving that the claimed loss falls within the coverage of the insurance policy." Boazova v. Safety Ins. Co., 462 Mass. 346, 351 (2012). If the insured meets that burden, "the burden then shifts to the insurer to show that a separate exclusion to coverage is applicable." Id.

Although MSA argues that the policy did not cover the homeowners' losses for numerous reasons, to resolve the homeowners' appeal, we need address only whether their losses constituted "property damage" within the meaning of the policy.

The policy required MSA to "pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' . . . to which this insurance applies."[6] The policy defined "property damage" to mean "[p]hysical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not physically injured." These words, construed in a reasonable and practical way, see Norfolk & Dedham Mut. Fire Ins. Co., 100 Mass. App. Ct. at 478, did not provide coverage for sums that R.C. Havens became legally obligated to pay as damages for the construction defects.

While the issue is one of first impression in Massachusetts, other jurisdictions have held that costs to repair or remove construction defects are not covered as "damages because of . . . 'property damage'" under commercial general liability policies. As these courts have reasoned, commercial general liability policies define "property damage"

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[6] The policy applied to property damage if, among other criteria, the property damage was "caused by an 'occurrence.'" The policy defined "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The parties dispute whether a construction defect that causes property damage to the contractor's own work can be an occurrence. Other jurisdictions are split on the issue, which we need not resolve. See United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 885-886 (Fla. 2007).

as "'physical injury,' which suggests the property was not defective at the outset, but rather was initially proper and injured thereafter." Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 49 (2011). See Capstone Bldg. Corp. v. American Motorists Ins. Co., 308 Conn. 760, 783-784 (2013).[7] Because faulty construction is defective at the outset, other jurisdictions have distinguished between claims for the costs of repairing or removing construction defects, which are not claims for property damage, and claims for the costs of repairing damage caused by construction defects, which are claims for property damage. See id. at 784-786; United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 888-889 (Fla. 2007); Crossmann Communities of N.C., Inc., supra; Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 309-310 (Tenn. 2007); Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651, 678-680 (Tex. App. 2006), abrogated on other grounds by Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 188 (Tex. 2010). Taking a simple

[7] Although we have not addressed this issue in the context of a commercial general liability policy, we did recently interpret a similar phrase, "damage to property," in a policy that provided coverage for the loss of actual business income. We concluded that policy language requiring a "direct physical loss of or damage to" property required "a physical alteration of the property." 75 Arlington St., Inc. v. Strathmore Ins. Co., 104 Mass. App. Ct. 197, 199 (2024).

example, an improperly installed window would not be "property damage," but resulting water damage to the surrounding wall would be. See Travelers Indem. Co. of Am., supra.

We find this reasoning persuasive and consistent with the general purpose of commercial general liability policies. Commercial general liability policies provide coverage "for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained" (citation omitted). Commerce Ins. Co. v. Betty Caplette Bldrs., Inc., 420 Mass. 87, 91 (1995). See Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 239-240 (1979) (although commercial general liability policies are needed to protect against "almost limitless liabilities" should faulty work damage another person or property, "replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers"). Accordingly, we hold that construction defects, without more, do not constitute property damage within the meaning of a commercial general liability policy.

The homeowners do not contest the distinction made in these cases, nor do they cite any case holding to the contrary. They argue, however, that, at least to some extent, they are asking MSA to indemnify R.C. Havens for the cost of repairing property

damage that the construction defects caused, not the cost of repairing or removing the construction defects themselves. In particular, the homeowners argue that the structural defects caused cracks in the walls and that the defects in the roof deck and siding caused water damage. This argument founders on its premise, as the homeowners have not identified any sums they were awarded to repair the cracks or the water damage. The summary judgment record contains expert testimony from the underlying trial that it would cost $122,466.83 to repair the structural defects by, among other things, installing the missing structural post, doubling up the floor joists, and jacking up the floors. The record also contains expert trial testimony that it would cost $14,207.44 to replace the roof deck and $40,864 to replace the siding.[8] In contrast, the homeowners have not directed us to anything in the record showing that they submitted evidence on the costs to repair the cracks or the water damage.

The summary judgment record thus establishes that the underlying jury verdict awarded damages for the costs of repairing or removing the construction defects themselves.[9] In

[8] The amounts that the jury awarded as damages were slightly less than these amounts.

[9] The homeowners did prove that they incurred costs remediating mold damage caused by the construction defects. But MSA argued in its summary judgment motion, and the judge found,

this situation, absent evidence that the construction defects caused injury to other property, MSA had no duty under its commercial general liability policy with R.C. Havens to indemnify R.C. Havens for the final judgment.

Declaratory judgment affirmed.

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that those costs fell within the policy's mold exclusion. On appeal the homeowners do not address that exclusion or argue that it does not apply.